DOCUMENT RESUME

ED 250 417 UD 023 874

AUTHOR Sinensky, Jeffery P.; Kahn, Jill L.
TITLE Church-State Separation: Recent Trends and Developments.
INSTITUTION B'nai B'rith, New York, N.Y. Anti-Defamation League.
PUB DATE 84
NOTE 35p.; For a previous report, see ED 199 824.
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Reports - Descriptive (141)
JOURNAL CIT ADL Law Report; v6 n3 p1-30 Fall 1984

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Church Role; Constitutional Law; Court Litigation; *Court Role; *Federal Government; *Government Role; *Legislation; Religion; *State Church Separation
IDENTIFIERS *Establishment Clause

ABSTRACT

This report analyzes recent cases and legislation in the area of church-state separation. A brief introduction asserts that the Supreme Court's method of evaluating establishment clause controversies is undergoing pervasive changes that have permitted incursions on establishment principles. The rest of the paper, providing support for this interpretation, discusses particular developments within these areas of concern: (1) religious practices in public schools (prayer, student religion clubs, and curriculum); (2) government aid to parochial schools; (3) display of religious symbols on public property; (4) religious discrimination and accomodation (religious discrimination in the military and in public schools, sabbath observer rights, and the Arab boycott of Israel); and (5) public sponsorship of religion (tax exemption for racially discriminatory private schools, church veto power over liquor licenses, and state-employed legislative chaplains). A conclusion argues that government's aid to and sponsorship of religious activities is proliferating. The free exercise clause, it is asserted, does not alter government's obligation to treat all religions neutrally. Rather, it mandates only government respect for each individual's religious beliefs. (KH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED250417

OCT 30 1984

CHURCH-STATE SEPARATION:
RECENT TRENDS AND DEVELOPMENTS

ADL LAW REPORT

UD 023874

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
E. Blumenberg
Anti-Defamation League
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
✓ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

FALL, 1984/VOL. VI NO. 3

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH/LEGAL AFFAIRS DEPARTMENT/CIVIL RIGHTS DIVISION

ADL LAW REPORT

is a periodic publication of the Anti-Defamation League of B'nai B'rith, 823 United Nations Plaza, New York, New York 10017

Kenneth J. Bialkin, National Chairman; Nathan Perlmutter, National Director; Burton Levinson, Chairman, National Executive Committee; Abraham H. Foxman, Associate National Director; Seymour D. Reich, Chairman, National Civil Rights Committee; Justin J. Finger, Civil Rights Director; Arnold Forster, General Counsel; Meyer Eisenberg, Chairman, National Law Committee; Robert Sugarman, Vice-Chairman; Charles Tobias, Chairman, National Committee on Discrimination; Ruth L. Lansner, Vice-Chairperson.

This issue of ADL Law Report was written and prepared by Jeffery P. Sinensky, Director, and Jill L. Kahn of ADL's Legal Affairs Department, with the assistance of Leslie Shedlin, Ruti Teitel and Ellen Weisburd.

Church-State Report
Table of Contents

Page

INTRODUCTION 1

I. RELIGIOUS PRACTICES IN PUBLIC SCHOOLS 1

A. Prayer in Public Schools 1
1. Cases 2
Collins v. Chandler Unified School District 2
Doe v. Aldine Independent School District 3
Beck v. McElrath 3
Duffy v. Las Cruces Public Schools 3
May v. Cooperman 4
Wallace v. Jaffree 5
2. Federal Legislation 6

B. Student Religion Clubs 6
1. Cases 7
Brandon v. Board of Education of Guilderland Central School District 7
Widmar v. Vincent 8
Lubbock Civil Liberties Union v. Lubbock Independent School District 8
Nartowicz v. Clayton County School District 9
Bender v. Williamsport Area School District 10
Bell v. Little Axe Independent School District 11
2. Federal Legislation 12

C. Curriculum 13
Hall v. Board of School Commissioners of Conecuh County 13
Crockett v. Sorenson 14
McLean v. Arkansas School Board of Education 15

II. GOVERNMENT AID TO PAROCHIAL SCHOOLS 15

Mueller v. Allen 16
School District of the City of Grand Rapids v. Ball 16
Felton v. Secretary, U.S. Department of Education 17

III. DISPLAY OF RELIGIOUS SYMBOLS ON PUBLIC PROPERTY 18

American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce 18
Goldstein v. Fire Department of the Village of Suffern 18
Lynch v. Donnelly 19
McCreary v. Stone 21
Greater Houston Chapter of the American Civil Liberties Union v. Eckels 22
American Civil Liberties Union v. City of Birmingham 23

IV. RELIGIOUS DISCRIMINATION AND ACCOMMODATION 23

A. Religious Discrimination in the Military 23
1. Cases 23
Goldman v. Secretary of Defense 23
Bitterman v. Secretary of Defense 24
2. Federal Legislation 24

B. Religious Discrimination in Public Schools 25
Menora v. Illinois High School Association 25

C. Sabbath Observer Rights 25
Anderson v. General Dynamics Convair Aerospace Division 25
Thornton v. Caldor, Inc 26

D. Arab Boycott 27
Abrams v. Baylor College of Medicine 27

V. PUBLIC SPONSORSHIP OF RELIGION 28

A. Tax Exemption for Racially Discriminatory Private Schools 28
Bob Jones University v. United States 28

B. Church Veto Power Over Liquor Licenses 29
Larkin v. Grendel's Den 29

C. State Employed Legislative Chaplains 29
Marsh v. Chambers 29

CONCLUSION 30

Introduction

This edition of ADL Law Report is the third in a series devoted to analyzing recent cases and legislation in the area of church-state separation.* This issue, once primarily the province of the judiciary, has become the focus of attention by the media, legislators, public officials and, increasingly, the general public. The last few years have seen an increase in the number of controversial judicial opinions and heated legislative debates on issues such as school prayer and tuition tax credits. These developments have prompted our reexamination of this area of the law to ascertain the impact they have had on the relationship between church and state.

The establishment and free exercise clauses of the Constitution recognize the delicate and distinctive position of religion in our society. That position, however, has been jeopardized by recent trends in Supreme Court precedent and federal legislation. A closer link between the state and religion has been sanctioned by the Supreme Court, which has upheld publicly sponsored Christian displays, state employment of clergy and state economic assistance for parochial school tuition; and by Congress, which recently enacted legislation allowing student groups to meet in public schools for prayer and worship.

These recent court decisions and legislative proposals, detailed below, seem to indicate that, if the "wall of separation" is not crumbling, it has become transparent. Equally disturbing is the growing indication that the Supreme Court's method of evaluating establishment clause controversies is undergoing pervasive changes, ones that permit increasing incursions on establishment principles. The issues of silent prayer, Sabbath observer rights, state aid to parochial schools, student religion clubs, and religious displays are currently pending before the Supreme Court, federal appellate courts and Congress. The resolution of these issues could determine the future role of church-state separation in American society.

This report focuses on several broad areas of concern under the establishment clause of the Constitution. It is not meant to be exhaustive, but, rather, to highlight significant developments of the past few years in the church-state arena.

I. RELIGIOUS PRACTICES IN PUBLIC SCHOOLS

Our public school system is charged with the momentous responsibility of educating our children and preparing them for the obligation of employment, adulthood and citizenship. School administrators have faced this challenge by combining a strong academic structure with opportunities to pursue individual personal interests through electives, sports programs and extracurricular activities. The variety of activities and subjects under discussion, the extended opportunity for interaction between students and school officials, the position of authority held by teachers and administrators, and the students' reliance on teachers for information, are inherent in the educational process and contribute to a situation in which personal values can be imparted to impressionable children. The Second Circuit Court of Appeals recently articulated the potential effect of religious activities in public schools:

> Our nation's elementary and secondary schools play a unique role in transmitting basic fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit....
>
> Misconceptions over the appropriate roles of church and state learned during one's school years may never be corrected. *Brandon v. Board of Education*, 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), *reh'g denied*, 455 U.S. 983 (1982).

Perhaps as a result of this great potential for influence, the public school has traditionally been a primary target in efforts to promote religious activities for children in the form of school prayer, religious study or worship clubs, and Bible or religion courses. The following summary of litigation and legislation examines recent developments in these areas.

A. Prayer in Public Schools

The recital of prayers in the public schools was declared unconstitutional by the U.S. Supreme Court in *Engel v. Vitale*, 370 U.S. 421 (1962). In that case, the Court ruled that the recital of a state-composed, ostensibly non-denominational prayer by children before the start of each school day violated the establishment clause of the First Amendment. The following year, in *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 306 (1963), the Supreme Court struck down as unconstitutional a similar program in which passages from the Bible were read in public schools. In *Schempp*, the fact that attendance at these Bible

*Previous issues, published in 1978 and 1981, are available from the National Legal Affairs Department.

readings was not compulsory failed to legitimize the program in the eyes of the Court, which held that young children would not be able to withstand the subtle coercive pressure to attend.

Since 1963, proponents of prayer in public schools have tried different approaches in their efforts to reinstitute school prayers. In the *Collins*, *Doe*, *Brandon* and *Lubbock* cases summarized below, federal courts struck down organized prayer recitation at voluntary student assemblies and extracurricular events. Another alternative approach, the enactment of silent meditation statutes, has spread rapidly in recent years. Under the provisions of most silent meditation statutes, students are asked by their teachers to sit quietly for a minute or two at the beginning of the school day and meditate or pray silently.

The language of many of the state "moment of silence" laws is ambiguous and does not explicitly mention prayer. However, the initial appearance of constitutional neutrality of silent meditation statutes is superficial. In most states, legislative history clearly demonstrates that the intention was to enact a law which gave students an opportunity to pray in school. In addition, the implementation of these statutes raises serious constitutional problems: the likelihood that students will perceive the activity as state approval of prayer, the coercion which will be exerted on students by teachers and peers to participate, the inappropriateness of the school setting for inculcating religious values. In addition, the surveillance by teachers and administrators to assure the "nondenominational," "voluntary" nature of silent prayer exercises engenders excessive entanglement between government and religion which is prohibited by the First Amendment.

Prior to 1981, only one court had ruled on the issue of silent prayer. In that case, *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976), a federal district court upheld a Massachusetts statute which authorized a period of silence at the opening of the school day for "meditation or prayer." The court found that meditation "is not necessarily a religious exercise" and that the statute served a valid secular purpose of encouraging students "to turn their minds silently toward serious thoughts and values." 421 F. Supp. at 342. Since *Gaines*, four other federal courts, as well as the U.S. Congress, have considered silent prayer statutes, and the issue is currently pending before the Supreme Court.

Cases and legislation involving both vocal and silent prayer are summarized below.

1. Cases

Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981)

Beginning in the 1977-78 school year, the Student Council was granted permission from high school authorities in Chandler, Arizona to open voluntary student assemblies with a prayer. One student was selected for each assembly who chose the manner and words in which the prayer was delivered, and school authorities were notified in advance of the assembly agenda.

In 1979, a federal district court ruled the practice unconstitutional. *Collins v. Chandler Unified School District*, 470 F. Supp. 959 (D. Ariz. 1979). On appeal, the Ninth Circuit affirmed, ruling that the recitation of prayers at student assemblies during the school day violated all three prongs of the tripartite establishment clause test.*

First, the appellate court found that the school defendants had asserted no secular purpose, and none was apparent, for the invocation at the assemblies. Next, the court held that by allowing the prayers, the state had placed its imprimatur on a particular religious creed:

> The Chandler students must either listen to a prayer chosen by a select group of students or forego the opportunity to attend a major school function. It is difficult to conceive how this choice would not coerce a student wishing to be part of the social mainstream and, thus, advance one group's religious beliefs. 644 F.2d at 762.

The Ninth Circuit cited Supreme Court precedent in rejecting the school's claim that the voluntary attendance at the assemblies saved the practice from constitutional attack: "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause. . . ." 644 F.2d at 761 (quoting *Engel v. Vitale*, 370 U.S. 421, 430). Finally, the court found that required surveillance and attendance by faculty and administrators at the assemblies entangled the government with religion.

The Ninth Circuit dismissed the claims that the school was required to permit the prayers in order to accommodate students' free speech and free exercise rights. "Unlike isolated members of

---

*In 1971, the Supreme Court articulated a three-prong test for evaluating establishment clause controversies. In order to be held constitutional, a statute (or government activity) must:

(1) have a secular purpose;
(2) have a primary effect which neither advances nor inhibits religion; and
(3) avoid excessive entanglement between government and religion.

Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971). Throughout the text, this is referred to as the "tripartite establishment clause test."

the military forces, or public university students residing on campus, these high school students 'are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place.'" 644 F.2d at 763 (quoting *Brandon v. Board of Education of Guilderland Central School District*, 635 F.2d 971, 977 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), *reh'g denied*, 455 U.S. 983 (1982)).

Doe v. Aldine Independent School District, 563 F. Supp. 883 (S.D. Tex. 1982)

The prayer at issue in *Doe* consisted of the following verse:

> Dear God, please bless our school and all it stands for. Help keep us from sin, honest and true, courage and faith to make our school the victor. In Jesus' name we pray, Amen.

This verse was sung at voluntary extracurricular events scheduled before or after regular school hours, such as athletic contests, pep rallies and graduation ceremonies, and was posted on the wall over the entrance to the Aldine (Texas) Senior High gymnasium. The prayer was often initiated at these events by the high school principal or another school employee.

The U.S. District Court for the Southern District of Texas granted summary judgment to the parent of a student who challenged the practice as a violation of the establishment clause. The court ruled that the prayer singing was an impermissibly religious means employed to accomplish the secular goals of raising student morale and decreasing school disciplinary problems. The fact that the events at which the prayer was recited were school sponsored and closely identified with the school program, as well as the fact that the prayer was often initiated by school authorities, contributed to an impression that the state was advocating religious belief and thereby advancing religion. The court also found that the practice entailed excessive government entanglement with religion because of supervision by school personnel at prayer events.

Finally, the district court rejected the school's claim that a restriction of the prayer recitation would interfere with the students' rights of free exercise.

Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982)

The Tennessee law challenged in *Beck* directed teachers to start the first class of the day in all public schools by announcing a moment of silence "for meditation or prayer or personal beliefs." Chief District Judge L. Clure Morton held the statute unconstitutional under the traditional tripartite establishment clause test.

First, the court found that "[a]s all terms in the statute are viewed together and accorded reasonable meaning, it is difficult to escape the conclusion that the legislative purpose was advancement of religious exercises in the classroom." 548 F. Supp. at 1163. Second, the court held that the statute had the impermissible effect of advancing religion, since school children would perceive the moment of silence as encouragement to pray. "It cannot be seriously argued, and certainly cannot be assured, that nice distinctions concerning the potential meanings of "meditation" and "personal beliefs" will naturally arise in the minds of public school students." 548 F. Supp. at 1165. Finally, the district court noted that the statute raised potential entanglement problems because it left school administrators to interpret as well as administer the law.

Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.N.M. 1983)

In 1981, the New Mexico Legislature enacted §22-5-4-1, a statute similar to the Massachusetts law upheld in *Gaines*, which authorized a period of silence at the beginning of each school day for "contemplation, meditation or prayer." District Judge Juan G. Burciaga, however, found the statute unconstitutional under the analysis used in *Beck*.

The court held that "no secular purpose is served by the statute." 557 F. Supp. at 1020. Judge Burciaga found that "the legislative avowals of secular purpose are clearly self-serving" and that the addition of "neutral" language in the statute, *i.e.* "contemplation" and "meditation," is "a transparent ruse to divert attention from the statute's true purpose." 557 F. Supp. at 1019.

The court continued its analysis by finding that the state had "chosen to sponsor and actively involve itself in the matter of prayer," thereby placing the "imprimatur of the State on that religious activity." 557 F. Supp. at 1021. This constitutes advancement of religion in violation of the First Amendment.

Finally the court held that implementation of the statute by school administrators would engender excessive entanglement with religion. Citing several factors to support this conclusion, the court noted that the moment of silence takes place during school hours, on school grounds and that the "atmosphere of silence is instilled and maintained by teachers." 557 F. Supp. at 1021. In addition, it is the responsibility of the school superintendent, and, ultimately, the school board, to enforce the statute. Judge Burciaga found further evidence of entanglement in the political divisiveness which arose over the statute in the schools and community.

The court concluded by denying a motion by the state defendants for judgment declaring they have a right to institute a moment of silence, so long as prayer is neither suggested nor encouraged, "as a means of encouraging discipline and intellectual composure." 557 F. Supp. at 1022. The court refused to grant this declaratory judgment and enjoined the defendants from "instituting any program similar to the moment of silence." 557 F. Supp. at 1023.

> If the defendants are not so enjoined, the moment of silence issue could well be brought before them again. But the defendants would be more careful to disguise their purpose the next time. With a wink and a nod, they could discuss the secular purposes for the moment of silence, and prohibit any mention of the school prayer issue. Having avoided the factors which lead the Court to rule against them in this case, they could reinstitute the moment of silence. 557 F. Supp. at 1023.

Following District Judge Burciaga's decision, the U.S. Court of Appeals for the Tenth Circuit refused to overturn the lower court's injunction. In November, 1983, the Supreme Court refused to review the case, thereby allowing the injunction to remain in force.

May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983)

In *May*, a New Jersey public high school teacher, several public school students and their parents challenged the constitutionality of a recently-enacted state law which authorized a moment of silence "for quiet and private contemplation or introspection." When the New Jersey Attorney General refused to defend the "moment of silence" law, asserting that it was merely a veiled attempt by legislators to reintroduce formalized prayer into public schools, the New Jersey Legislature, which passed the bill over the Governor's veto, hired outside counsel to defend the constitutionality of the statute.

In October, 1983, the U.S. District Court for the District of New Jersey ruled the statute violative of the establishment clause. According to District Judge Dickinson R. Debevoise, "[w]hat the moment of silence bill has done is to mandate that all students assume the posture of one traditional form of prayer." 572 F. Supp. at 1569. This view of the moment of silence law is determinative of the remainder of the court's constitutional analysis.

Reviewing each element of the tripartite test in turn, the district court held first that the purpose of the New Jersey moment of silence law was not secular. Rejecting claims by the New Jersey legislators that the bill's purpose was to "serve as a useful boundary between non-school activities and school work," Judge Debevoise declared:

> Unless one examines the statute in a total vacuum, this conclusion is without rational basis. All the evidence points to the religious intent of this enactment—the period of more than a decade during which the New Jersey legislature sought to evade *Engel* and *Abington Township* in order to reintroduce a mandatory time for prayer in the public schools; the debate upon the Bill which was in terms of public prayer and state involvement in religion; the time and manner in which the minute of silence was mandated, following the form and posture of school prayer which was outlawed in the early 60's. 572 F. Supp. at 1572.

Turning to the second prong of the establishment test, the court concluded that the "moment of silence" law has the effect of both advancing and inhibiting religion. This conclusion departs from the usual constitutional analysis which focuses only on the effect of advancement of religion. Here, Judge Debevoise noted that not only does the "state advance the religion of one by designating a time and place when children and teachers may pray if they do so in a particular manner," but it also inhibits the religion of others in at least two ways:

> First, there are those whose religious practices include silent prayer and meditation but who, as an article of faith, believe that the state should have no part in religious matters. For them mandated prayer is no longer prayer. . . .
>
> Second, by mandating a moment of silence which permits some persons to engage in prayer, Bill 1064 prevents other persons from engaging in their kind of prayer. . . .
>
> Bill 1064, therefore, mandates an environment which allows some to pray but which prevents others from engaging in their form of prayer. . . .
>
> Finally, there are those who profess no religion and to whom any form of prayer is offensive. . . .
>
> Children holding these views, as illustrated in the present case, are forced either to endure an exercise which runs counter to their beliefs or to face public opprobrium or ridicule by asking to be excused each day. 572 F. Supp. at 1574, 1575.

As to the third inquiry, concerning government entanglement with religion, the court rejected the notion that the statute would involve the state in monitoring sectarian activities. However, the court accepted the argument that the law would result in another form of entanglement—political divisiveness—holding that a "required minute of silence would put children and parents who believe in prayer in the public schools against children and parents who do not." 572 F. Supp. at 1575.

Wallace v. Jaffree, 705 F.2d 1526 (11th Cir. 1983), *prob. juris. noted*, 52 U.S.L.W. 3719 (April 2, 1984) (Nos. 83-812, 929)

Jaffree involves a constitutional challenge to Alabama statutes which authorize state-composed prayer and a period of silence for "meditation or voluntary prayer," as well as a challenge to the conduct of teachers in the Mobile County public schools who engage in and direct children in various prayer activities.*

United States District Judge W. Brevard Hand dismissed the complaint, ruling that the establishment clause of the First Amendment applies only to the federal government, and that the State of Alabama remains free to establish a religion. *Jaffree v. Board of School Commissioners of Mobile County*, 554 F. Supp. 2104 (S.D. Ala. 1983).

On appeal, the Eleventh Circuit reversed Judge Hand's decision. The appellate court first held that the lower court had erred in disregarding Supreme Court precedent on the establishment clause, which clearly dictates the principle that states, as well as the federal government, are prohibited from establishing a religion.

The Eleventh Circuit then analyzed the constitutionality of the Alabama statutes and Mobile County prayer activities under the establishment clause. The state defendants had argued that since the teachers' prayer activities were not motivated by school board policy or by state statute, the element of "state action" necessary for an establishment clause violation did not exist. However, the appellate court found from the record that school board members and the superintendent of schools were made aware of the prayer activities and took no steps to discourage them, thereby ratifying the teachers' conduct. Analyzing the teachers' prayer activities under the Supreme Court's tripartite test, the Eleventh Circuit found that the conduct was religiously motivated: "prayer is perhaps the quintessential religious practice . . . since prayer is a primary religious activity in itself, its observance in public school classrooms [implies a religious purpose]." *Jaffree*, 705 F.2d 1526, 1534 (quoting *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982)). The court concluded that the involvement of public school teachers in prayer activities has the impermissible effect of advancing religion.

The Eleventh Circuit next found that both Alabama prayer statutes similarly "advance and encourage religious activities." The court noted that in *Engel*, the Supreme Court struck down as unconstitutional a state-composed prayer which "contained considerably fewer religious references" than the prayer mandated by Alabama Code §16-1-20.2:

> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools. In the name of our Lord. Amen.

This statute, the court ruled, "was motivated by religious consideration," and is impermissible under the First Amendment. 705 F.2d at 1535.

Finally, the Eleventh Circuit considered Alabama Code §16-1-20.1, authorizing a moment of silence for meditation or prayer. Striking down this statute also on the grounds that its purpose and effect was to advance religion, the court noted:

> We do not imply that simple meditation or silence is barred from the public schools; we hold that the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation. It is not the activity itself that concerns us; it is the purpose of the activity that we shall scrutinize. Thus, the existence of these elements require that we also hold section 16-1-22.1 in violation of the establishment clause. 705 F.2d at 1535-1536.

On April 2, 1984, the Supreme Court summarily affirmed the unconstitutionality of the state-composed prayer statute and agreed to review the silent prayer statute next term. The Court declined, without comment, to review the other prayer activities by teachers, which were held unconstitutional by the Eleventh Circuit.

Despite the lack of unanimity in the district court decisions on "moments of silence" in *Gaines*, *Beck*, *Duffy* and *May*, the Eleventh Circuit decision striking down Alabama's statute

---

*These practices include readings from the Bible, such as Matthew 6:9-13 (The Lord's Prayer), as well as the following prayer song:

> God is great, God is good,
> Let us thank Him for our food,
> Bow our heads we all are fed,
> Give us Lord our daily bread,
> Amen!

remains the only federal appellate ruling on the issue. The Supreme Court's decision on silent prayer will be a significant one, since twenty-two states currently have statutes similar to Alabama's.

2. Federal Legislation

Since the Supreme Court's decisions in *Engel* and *Schempp*, proponents of school prayer have focused on federal legislation to accomplish what the Court struck down. During the 1960's and 1970's hundreds of bills were introduced to restore school prayer. These bills took various forms, calling for constitutional amendments, alternative prayer practices such as moments of silence, and removal of the school prayer issue from federal court jurisdiction.

More recently, debate in the 98th Congress centered on constitutional amendments allowing school prayer. S.J. Res. 73 provided: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. Neither the United States nor any State shall compose the words of any prayer to be said in public schools." S.J. Res. 212 was materially similar, but called for "group silent prayer or meditation." The Senate Judiciary Committee held hearings on these amendments during the summer, 1983. The measures were brought to the floor of the Senate for debate in early March, 1984.

Although neither prayer provision garnered the two-thirds vote necessary to pass a constitutional amendment, their failure to pass was due partially to the order in which they were considered. The votes cast on March 14, 1984 against S.J. Res. 212 (silent prayer) reflected opposition to school prayer as well as support for the alternative measure, vocal prayer. The vocal prayer amendment was defeated one week later by a vote of 56-44, 11 votes short of the necessary two-thirds.

On July 26, 1984 the House of Representatives amended an education appropriations bill, H.R. 11, by an overwhelming vote of 378-29, to include a provision stating that "no State or local agency shall deny individuals in public schools the opportunity to participate in moments of silent prayer." Although the language is somewhat ambiguous, it could easily be interpreted to allow organized group prayer in public schools.

The Senate, however, has not passed an identical education appropriations measure, and therefore, a House-Senate conference committee must be appointed to settle the differences between the two bills. Senate Majority Leader Howard Baker (R-Tenn.) is faced with a possible filibuster led by Senator Lowell Weicker (R-Conn.) if he attempts to appoint conferees, because Senator Weicker is opposed to any bill which would include a school prayer provision. Since Senator Baker has indicated, therefore, that he will not appoint conferees, it is unlikely that a school prayer provision will be enacted during this session of Congress.

B. Student Religion Clubs

Since 1980, there has been a proliferation of litigation and proposed legislation involving access to public school facilities and premises by students seeking to meet during the school day for religious worship and discussion. These student clubs implicate significant establishment clause concerns: the clubs allow state-sponsored, organized religious activities to occur in public schools, which has been held unconstitutional by the Supreme Court; arguments by supporters that the clubs are assertedly "student-initiated" serve to obscure the reality, which is that outside fundamentalist groups are organizing and directing the students' activities; powerful peer pressure diminishes many students' ability to make meaningful personal choices and eliminates the notion of "voluntary" participation in the clubs; state requirement of faculty supervision and the practical recognition that even supposedly neutral supervision entails some degree of participation and influence, leads to inevitable entanglement between the government and religion. Perhaps the most serious concern is that "equal access" will prove to be a divisive force within public schools, fragmenting students into "religious" and "nonreligious" factions or into distinctly insular religious denominations.

Despite these concerns, extracurricular religious clubs are perceived by many as an effective means of reversing what has been characterized as a decline in morals among young people. Bible and prayer clubs are urged as a panacea for drug abuse, juvenile delinquency and teenage pregnancy. In addition, efforts to promote such clubs under the appealing banner of "equal access" focus on an asserted First Amendment right school children hold to pray during the school day. While it is true that the free exercise clause of the First Amendment protects every student's right to pray individually, the establishment clause prohibits the state from advancing or encouraging organized religious activity. According to the "equal access" argument, however, student prayer clubs deserve access to school premises on an equal basis with student clubs devoted to stamp collecting or chess.

Many schools, in the absence of specific legislation or court guidance, have allowed religious clubs in the past. These clubs usually adhere to a Christian fundamentalist or evangelical philosophy and seek to obtain the use of school facilities, before or after regular school hours, for their meetings or other activities. They describe

their activity in terms of providing students of "common" or "Christian" beliefs with an opportunity to learn more about their beliefs through "discussion, sharing and studying" or to "socialize outside of school hours and thereby draw closer to one another which hopefully will have a positive influence on the school atmosphere." While most groups are comprised entirely of students, many have faculty advisors and a few have operated with the participation of non-faculty adults.

Recent conflicts over "equal access," detailed below in the discussion of federal litigation and legislation, demonstrate that the battle is not between pro-prayer and anti-prayer forces, but rather is a question of the proper setting and sponsor for religious activities. The discussion indicates also a conflict between federal court decisions and recently enacted federal legislation. The resolution may ultimately be decided by the U.S. Supreme Court. The Court's pronouncements on the constitutionality of equal access, in *Widmar v. Vincent*, have been limited to a residential state university setting. Nonetheless, it is apparent from the post-*Widmar* decisions summarized below that the Supreme Court's reasoning has had considerable impact on cases involving public secondary schools.

1. Cases

Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), *reh'g denied*, 455 U.S. 983 (1982)

The first federal court decision on religious clubs involved a high school in New York. In September, 1979, a group called "Students for Voluntary Prayer" requested permission from school authorities to use public school property for voluntary religious activities immediately prior to the commencement of the school day. When school officials refused their request, the students brought suit in the U.S. District Court for the Northern District of New York claiming that the refusal violated the students' rights to free exercise of religion, freedom of speech and association, and equal protection of the law.

The district court rejected these claims and held that the school officials were mandated, by virtue of the establishment clause, to prohibit the use of school facilities for the intended religious practices. *Brandon v. Board of Education of Guilderland Central School District*, 487 F. Supp. 1219 (N.D.N.Y. 1980). The court focused on the Supreme Court's "primary effect" analysis and concluded that granting permission to the student group to use school facilities for religious purposes would unlawfully advance religion:

> Should the plaintiffs prevail in this action, it is difficult to perceive any other result than the use of public school property for religious purposes. Not only would this constitute a contribution by the State of financial assistance to religion (provision of free rent and utilities for prayer meetings), but it would logically lead to the outward appearance of the placement of official state sanction on religious activity. 487 F. Supp. at 1228-1229 (footnotes omitted).

In November, 1980, the U.S. Court of Appeals for the Second Circuit unanimously affirmed the decision of the district court in an opinion analyzing the conflicting considerations of the students' First Amendment rights and the establishment clause problems that would arise if the school permitted the prayer meetings. According to the appellate court, the students' free exercise rights were not infringed upon because the school had not placed an absolute ban on communal prayer nor had it imposed sanctions on or denied benefits to the students. The students' equal protection argument was also rejected because the school's policy uniformly denied all religious groups access to school facilities.

The students' free speech and association claims were rejected because of two vital distinctions which the appellate court recognized in this case: 1) a high school is not a public forum where religious views can be freely aired; rather, sensitive establishment clause considerations limit the students' rights in this area, and 2) the students intended to conduct prayer meetings in the high school, not merely discussions about religious matters.

Addressing the establishment clause considerations, the Second Circuit held that permitting the prayer meetings in the high school would be impermissible. Since the school would be lending the appearance of official support to religion, the primary effect of conducting the prayer meetings at school would be to advance religion. In addition, school supervision of students at all times during the school day is mandated by state law and would be necessary to ensure that participation in the prayer meetings remained voluntary. This would result in excessive entanglement of the public school with religion. Concluding that these establishment clause considerations must prevail, the Second Circuit held that voluntary student prayer meetings may not be held before classes in public school facilities.

On December 14, 1981, the U.S. Supreme Court denied a petition seeking review of the Second Circuit's decision. The Court's action came one week after its decision in *Widmar*, dis-

cussed below, and while it cannot be considered as legally affirming the *Brandon* opinion, the timing indicates that the Court may not intend to extend its *Widmar* analysis to the public school setting.

Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269 (1981)

This dispute grew out of a regulation of the University of Missouri-Kansas City which prohibited use of the state "university buildings or grounds . . . for purposes of religious worship or religious teaching." The university relied on this regulation, which it stated was required by the state constitution, as well as the First Amendment, to deny a student group the use of a meeting room for prayer and Bible discussion. The student organization, whose purpose was to promote "a knowledge of Jesus Christ among students," brought suit against the university asserting that the regulation violated their rights to free exercise of religion, free speech, due process and equal protection of the law.

The district court ruled in favor of the university, holding that the establishment clause did not permit the use of state university facilities by student groups for religious worship. *Chess v. Widmar*, 480 F. Supp. 907 (W.D. Mo. 1979). The Eighth Circuit Court of Appeals, reversing, ruled that religious speech and association is entitled to First Amendment protection, and that by permitting use of state campus facilities by all student groups—save one—the state had unconstitutionally restricted access to a public forum on the basis of speech content. *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980).

The appellate court rejected the university's argument and the district court's analysis that allowing religious worship or teaching on campus would impermissibly advance religion in contravention of the establishment clause. "Rather, it would have the primary effect of advancing the university's admittedly secular purpose—to develop students' 'social and cultural awareness as well as [their] intellectual curiosity.'" 635 F.2d at 1317.

The U.S. Supreme Court affirmed the Eighth Circuit's decision, ruling, for the first time, that religious worship constitutes protected speech and association and analyzing the students' claims under the First Amendment's free speech clause. Justice Powell, writing for the majority, found that the university regulation constituted a content-based restriction on the students' free speech rights, which could be justified only by a narrowly drawn, compelling state interest. Although Justice Powell agreed that the constitutional obligation of maintaining a strict separation between government and religion, as required by the U.S. and Missouri Constitutions, *may*, in some cases, be characterized as compelling, he found that in this case, neither the federal establishment clause nor its counterpart in the state constitution would be violated by allowing student clubs to meet on the state campus for religious worship.

The focus of the Court's analysis was on the "effect" prong of the tripartite test. Justice Powell conceded that religious groups would benefit from access to university facilities, but held the benefit would be merely "incidental" for two reasons: First, the university's "open forum" does not confer state imprimatur on religious sects or practices; and second, there would be a variety of nonreligious and religious speakers on campus, precluding dominance of the university's forum by religious groups.

Justice White, the sole dissenter, criticized the majority's characterization of religious worship as protected speech, but would have allowed the university discretion, under the establishment clause, to permit religious groups on campus.

In a footnote, the majority decision noted that college students are less impressionable than "younger students." 102 S. Ct. 269, 276, n. 14. This observation, coupled with the Court's unwillingness to review the *Brandon* decision, indicates that the Court's analysis or decision may be different in a case involving religious worship clubs at the elementary or secondary school level. The cases below represent federal district and appellate courts' treatment of that situation in light of the *Widmar* decision.

Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038, *reh'g denied*, 680 F.2d 424 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983)

The religious activities which were originally the subject of a 1971 complaint by the Lubbock Civil Liberties Union (LCLU), consisted of classroom prayers led by teachers, morning Bible readings and a period of silent prayer over the school public address system, distribution of the Christian Bible to fifth and sixth graders by the Gideon Camp, and school assemblies featuring Christian evangelical speakers. These practices continued unabated over the next eight years, the only change coming from the implementation of school district policy which instructed that the activities should be student rather than teacher initiated.

In 1980, after the LCLU filed suit in federal district court, the school's policy was modified. The LCLU challenged the constitutionality of the new policy, arguing that several of the prior, impermissible practices would still be permitted and challenging in particular the following provision:

4. The School Board permits students

> to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

The U.S. District Court for the Northern District of Texas ruled the pre-1980 activities unconstitutional, but upheld the facial validity of the 1980 school board policy. The court refused to issue an injunction prohibiting the school from continuing the unconstitutional pre-1980 activities.

On appeal, the Fifth Circuit reversed, holding that the primary effect of paragraph four of the 1980 policy, permitting student prayer groups before or after school hours, impermissibly advanced religion and would foster excessive entanglement with religion. Under the "effect" test, the appellate court found that the policy "implies recognition of religious activities and meetings as an integral part of the District's extracurricular program and carries with it implicit approval by school officials of those programs." 669 F.2d 1038, 1045.

The court noted that the policy authorized student prayer "at a time closely associated with the school day," and rejected the school's claims that the "voluntary" attendance at the prayer meetings eliminated establishment clause problems. "Rather, the critical factors are the District's use of its compulsory education machinery, which provides students available to attend even voluntary meetings, and its implicit support and approval of the religious meetings." 669 F.2d at 1046.

Citing the *Brandon* decision, the Fifth Circuit held that the faculty supervision struck down in that case as entangling government and religion was also present in *Lubbock*. This surveillance, along with the use of school facilities, led the court to rule the prayer meetings unconstitutional.

While the Fifth Circuit agreed that the pre-1980 practices in the school were unconstitutional, it accepted the trial court's determination that these practices were not likely to continue and refused to issue an injunction.

The school district appealed the Fifth Circuit's finding of unconstitutionality as to the student prayer meetings. The Supreme Court, however, refused to review the case.

Nartowicz v. Clayton County School District, No. 83-8115 (11th Cir. July 17, 1984)

This lawsuit was commenced in 1983, challenging four distinct practices in Clayton County, Georgia public schools: 1) meetings of the "Youth for Christ" club at the junior high school after classes; 2) voluntary school assemblies featuring speakers espousing religious views; 3) signs placed on school property advertising the location of a church and a schedule of its religious worship services; 4) announcements over the school public address system and on the bulletin board regarding church sponsored events.

A preliminary injunction was issued by Federal District Judge Marvin H. Shoob enjoining the challenged practices as violative of the establishment clause. The school district acknowledged the impropriety of allowing student assemblies promoting religion and religious signs on campus, but appealed the court's decision as it pertained to student religion clubs and announcements of church sponsored events.

On July 17, 1984, the Eleventh Circuit Court of Appeals affirmed the district court's decision in a brief *per curiam* opinion. The appellate court's analysis of the "Youth for Christ" club differed from the lower court's, which found that the school's eleven year history of permitting the club did not reflect a secular purpose, as required under Supreme Court case law. The Eleventh Circuit, however, found there was insufficient evidence to determine whether the "Youth for Christ" club "was introduced for the purpose of advancing religion, as opposed to the secular purpose of encouraging extracurricular activity," recognized as valid in *Brandon* and *Lubbock*. *Nartowicz*, slip op. at 4270.

Analyzing the school's practice of permitting "Youth for Christ" to meet on school premises under faculty supervision under the "effect" test, however, the appellate court noted that a "devotion" is read at each meeting, there is praying at a minority of the meetings, and that the assistant principal schedules the club's meetings and announces the schedule over the public address system. "When the evidence above is evaluated in light of the district's apparent support of religious assemblies, religious signs, and announcements of church sponsored activities via bulletin boards and public address systems. . .we are unable to conclude that the district court abused its discretion in issuing the preliminary injunction." *Nartowicz*, slip op. at 4271.

Since the school district agreed that school announcements of religious activities would be impermissible, the appellate court's review of the announcements focused on the school's ability to distinguish religious from nonreligious activities:

> Here, the defendants conceded that the announcement of church sponsored religious activities would have the impermissible effect of advancing religion. It would appear from the evidence presently available that in order to avoid announcing religious activities

> school representatives must monitor and occasionally investigate the subject matter of proposed announcements, and sort out those church sponsored activities that are religious from those that are not, without the benefit of written policy guidelines. Under these circumstances, it was not an abuse of discretion to hold that there existed a substantial likelihood of entanglement. *Nartowicz*, slip op. at 4272.

The Eleventh Circuit concluded by affirming the district court decision enjoining the school from allowing "Youth for Christ" and other religious clubs to meet on school premises with faculty supervision and from announcing church sponsored activities.

Bender v. Williamsport Area School District, No. 83-3284 (3d Cir. July 24, 1984)

One day before federal "equal access" legislation was passed by Congress (see discussion below), the U.S. Court of Appeals for the Third Circuit issued an opinion striking down religious clubs during school hours as unconstitutional. Both the Third Circuit's opinion and the lower court decision it reversed focused on the school district's policy regarding extracurricular student clubs.

Williamsport's clubs meet during a regularly scheduled period during the school day. Students who do not participate in a club may elect to go to their homeroom or the school's library. Each club is assigned an adult advisor and has access to the school bulletin board and public address system. School administrators have, in the past, approved the formation of a student club if it will "contribute to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper."

The *Bender* case arose when a group of students were denied permission by school officials to form a club called Petros for the purpose of reading scriptures, praying, and discussing and sharing religious views, on the grounds that the "law simply does not permit public schools to authorize or support religious activities on school property." The students filed suit in the U.S. District Court for the Middle District of Pennsylvania, asserting that they had a free speech right guaranteed by the First Amendment to meet on school premises for religious study and prayer.

Relying on *Widmar*, the district court agreed with the students and held that the Williamsport Area School District, by liberally permitting students to engage in a range of club activities during school hours, had created a limited public forum and, therefore, had violated students' free speech rights by refusing to sanction a religious club. The district court found that the establishment clause did not prohibit such clubs.

One member of the Williamsport Area School Board, named individually as a defendant in *Bender*, appealed the decision to the Third Circuit. In a 2-1 decision on July 24, 1984, the appellate court reversed, joining the Second, Fifth and Eleventh Circuits in striking down religious clubs in public schools.

The Third Circuit began its opinion by determining whether Williamsport had created a public forum, for students' free speech purposes, by allowing a variety of clubs to meet. Comparing the school to the state university in *Widmar*, which the Supreme Court held had created an open forum, the appellate court noted that the setting and curriculum of a secondary school is more "circumscribed" and "less conducive to. . .an unfettered inquiry." *Bender*, slip op. at 21. However, the *Bender* Court held that the broad range of clubs permitted by the school, as well as its encouragement of students to choose and participate in activities, led to the conclusion that Williamsport had created a limited student forum "restricted to the extent that the proposed activity promote the intellectual, physical, or social development of the students." Slip op. at 25. The court next determined that since the activity proposed by Petros fell within the bounds promoting "the intellectual and social welfare of students," the group had a legitimate First Amendment interest in forming a club at Williamsport. *Id.*

Because the school had cited the content of the proposed club's activities in denying it access to school facilities, the court found that the restriction must be narrowly tailored to serve a compelling interest in order to justify an infringement of First Amendment rights. As in *Widmar*, the state, represented by Williamsport, had asserted the establishment clause as a compelling interest. Thus the *Bender* Court, following *Widmar*, had to determine whether the establishment clause would be violated if Petros students were allowed to meet.

Citing several distinctions between a high school and a state university, the appellate court held that "the existence of religion within the school creates the perception among school children that the State has approved a religious activity and thus has placed its imprimatur on religion." Slip op. at 38. The Third Circuit reasoned that high school students are less mature and more impressionable than university students. In addition, a religious group would have a more obvious presence in a secondary school than on a college campus. Further, an adult supervisor would be required to monitor high school activities. Finally, the court noted that the proposed religious activity

would take place in school classrooms during hours of compulsory attendance. Rejecting assertions by Petros students that the activities would be non-denominational, the Third Circuit declared:

> We cannot ignore, however, the reality that, in practice, any meaningful religious activity must cater to some subset of spiritual beliefs and exclude others. By definition, at the least it excludes those who espouse no religious beliefs at all. We believe that once activity is found to be religious, as the activities of Petros concededly are, then the potential for divisiveness and sectarian dispute is raised, no matter how accommodating the actual practice may be. Slip op. at 34.

Concluding its establishment clause analysis, the court found that excessive entanglement between government and religion would result if Petros' religious activities took place during the school day.

The Third Circuit was thus faced with a constitutional dilemma left unresolved by *Widmar*: a situation in which accommodation of students' free speech rights to engage in religious activity conflicts with the prohibitions of the establishment clause. Resolving this conflict in favor of establishment concerns, the Third Circuit reasoned that the free speech rights at issue were not absolute, but subject to regulation by the school, and that it would not significantly impair the group's rights if Petros was forced to conduct its religious activities outside of school hours and off school premises.

The court concluded by offering the following observation:

> Instead of uniting students from varying backgrounds and beliefs, prayer in the public schools segregates students along religious lines. This works to the detriment of all students, and may particularly ostracize and stigmatize those students who are atheists or adhere to religious beliefs not shared by the majority of their fellow students. The peer pressure inherent in a high school environment exaggerates the ostracism which may be experienced by nonconforming students, especially if they see student leaders or favorite teachers participating in the prayer clubs. Accordingly, we are of the view that "Sacred practices of religious instruction and prayer, [as] the Framers [of the Constitution] foresaw, are best left to private institutions—the family and houses of worship." *Bender*, slip op. at 51 (quoting *Brandon*, 635 F.2d 971, 973).

On August 15, 1984, the appellate court denied a motion by the students to rehear the case *en banc*, by a panel of the Third Circuit. The Petros students have indicated they plan to appeal the Third Circuit's opinion to the Supreme Court.

> *Bell v. Little Axe Independent School District*, No. Civ 81-620T (W.D. Okla. 1983), *appeal docketed*, Nos. 83-1458, 1493 (10th Cir. April 11, 1983).

Since 1981, there have been prayer meetings on public school premises of the Little Axe School District of Cleveland County, Oklahoma. These prayer meetings are conducted in the school building on Thursday mornings between 8:00 A.M., when the school buses leave the children at the school premises, and 8:25 A.M. The meetings include "prayers, songs and 'testimony' concerning the benefits of finding Jesus Christ and...the Christian doctrine." Public school teachers attend, monitor and participate in the prayer meetings, which are advertised on school bulletin boards.

The prayer meetings held during the school day at Little Axe are authorized by the Oklahoma Voluntary Prayer Act, which provides: "The board of education of each school district shall permit those students and teachers who wish to do so to participate in voluntary prayer." Further, after initiation of the *Bell* lawsuit, these prayer meetings were held pursuant to a school board policy newly adopted on November 4, 1981, which provides in relevant part:

> All students, whether as school sponsored clubs, nonsponsored student associations or individuals shall have equal access to school facilities....
>
> Student use of school facilities shall not be regulated on the basis of the content of the students' meetings....
>
> Religious speech shall receive the same rights and protections as political and all other speech, including private voluntary prayer, reading from religious or political books and speaking about political or religious topics.

These prayer sessions, the "Oklahoma Voluntary Prayer Act," and the Little Axe School Board Policy, were challenged by plaintiffs Joann Bell and Lucille McCord, parents of Little Axe school students, as unconstitutional establishments of religion.

The U.S. District Court for the Western District of Oklahoma ruled in favor of the plaintiffs as to the prayer sessions. After a six-day trial, which included testimony by expert witnesses on the religious nature of the prayer sessions, the court found that the sessions violated all three prongs

of the tripartite test, holding, first, that the sessions were undoubtedly of a religious nature and content, and second, that their principal or primary effect was to advance religion. District Judge Ralph G. Thompson also noted that the board provided religious services on school grounds, during the school day, with teachers or school officers attending, monitoring or participating, and that this constituted the type of governmental support and entanglement prohibited by the establishment clause.

The court, however, held the school board policy permissible, and the "Oklahoma Voluntary Prayer Act" constitutional on its face. Based upon the defendants' affirmative disclaimers of any reliance upon the statute, the court did not address the issue of the statute's constitutionality as it applied to the facts in this case.

The plaintiffs appealed that portion of the district court decision which upheld the "Oklahoma Voluntary Prayer Act" and the school board policy. The case is currently pending in the U.S. Court of Appeals for the Tenth Circuit.

2. Federal Legislation

Concomitant with the attempts to pass a constitutional amendment allowing school prayer, discussed above, were legislative efforts to extend the *Widmar* decision to public schools, thereby legalizing student religion clubs. The result of this activity was the enactment of "equal access" legislation in July, 1984. This statute claims to seek equal treatment for religious groups and nonreligious groups on the public school campus, grounding its constitutionality on the *Widmar* decision, which accorded the right to use university facilities to a student religious group. Proponents of equal access claim that public school students should also be afforded this right.

During the summer, 1983, two variations of equal access legislation were considered in Congress. The first would allow equal access in the elementary and secondary schools, and would allow faculty involvement in prayer. This was the Denton Bill in the Senate, alternatively S. 1059 and S. 425, and the Lott Bill in the House, H.R. 2732.

The Lott Bill provided for a cut-off of federal funds to any public institution which:

> permits students or faculty members, or both, or groups of students, groups or faculty members, or both, to engage in voluntary extracurricular activities on school premises of a public elementary or secondary school or a public institution of higher education during non-instructional periods but denies equal access and opportunity to, or discriminates against, students or faculty members or both, that seek to engage in voluntary extracurricular activities that involve prayer, religious discussion, or silent meditation in school or institution premises during non-instructional periods.

The second type of equal access bill was the Hatfield, S. 815/Bonker, H.R. 4172, 4996 legislation. Termed the "Religious Speech Protection Act," these bills confined equal access to the secondary schools and attempted to prohibit faculty involvement and other forms of school sponsorship. In particular, proposed amendments to S. 815 provided for the following safeguards: meetings should be voluntary and student-initiated; no actual or implied sponsorship by school or its agents is permitted; no unlawful activity is permitted; and no outside person is allowed to control, direct, sponsor or attend such meetings on a continuing basis, but students may occasionally invite outside resource persons. With these limiting amendments, equal access legislation gained the support of several traditionally separationist groups, including the National Council of Churches and the Joint Baptists.

While the Bonker Bill was being debated in the House, Representative Don Edwards (D-Cal.) introduced the "Secondary School Equality of Access Act," H.R. 5439. This bill went beyond religious speech by authorizing, in addition, political and philosphical student clubs. This "open forum" concept garnered further support for equal access, and prompted the ACLU to withdraw its opposition to the legislation.

In June, 1984, the Senate approved an "open forum" equal access measure which incorporated the major provisions of both the Bonker and Edwards proposals. The House of Representatives passed an identical bill on July 25, 1984. President Reagan signed the measure into law on August 11, 1984.

The enacted legislation provides that any public secondary school which has a "limited open forum" (*i.e.*, the school allows at least one non-curriculum related student group to meet on school premises) may not deny equal access or discriminate against any student group on the basis of the "religious, political, philosophical or other content of the speech."

Several important aspects of the measure should be noted:

- Equal access applies only to public secondary schools.
- Student meetings must be voluntary and student initiated.
- School officials or teachers may be present at meetings but may not participate.
- Schools may not limit the formation of student groups on the basis of the number of

students involved.

- "Nonschool persons" (*i.e.*, outside speakers or clergy) may be present at and participate in student meetings, but may not "direct, conduct, control or regularly attend activities of student groups."
- Meetings are to be held during "noninstructional time," defined as "before actual classroom instruction begins or after actual classroom instruction ends."
- The term "noncurriculum related" means that a French club or hockey club may not create an open forum, since they are related to subjects found in school curriculum, *i.e.*, foreign language instruction and physical education.
- The law contains no sanctions, *i.e.*, cut-off of federal funding. The only remedy available for a violation of the law is a civil lawsuit by students to compel a school to comply with the terms of the equal access law.

Several groups threatened to challenge the constitutionality of equal access legislation, although no lawsuit has yet been filed. The issue which a federal court will face is whether the statute should be upheld, most likely on the basis of the *Widmar* analysis, or struck down, based on establishment clause principles enunciated in *Brandon*, *Lubbock* and *Bender*. Substantial differences exist between the facts in those cases and the provisions of the equal access statute, *i.e.*, degree of faculty participation and timing of meetings. Whether these differences warrant an extension of the *Widmar* "open forum" concept to public schools remains to be seen. It is apparent that litigation over religion clubs in public schools is far from over.

C. Curriculum

The cases discussed under this heading involve attempts to introduce religious study into the classroom as part of the public school curriculum, in the form of Bible classes and creation science studies. The Supreme Court has yet to rule on either of these practices. In the *Schempp* case, holding daily Bible reading unconstitutional, the Supreme Court noted:

> It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment. *Schempp*, 374 U.S. 203, 225 (1963).

While Bible literature or history courses are not inherently unconstitutional, the manner in which they are taught may conflict with First Amendment principles. The Supreme Court's language indicated that, in order to pass constitutional muster, a Bible course must be "presented objectively." However, many such courses, ostensibly structured around the "literary and historic qualities" of the Bible, are nothing more than thinly veiled attempts to introduce Christian religious doctrine and values.

In recent years, efforts have been made to modify the science curriculum in many public schools to include the theory of creation. "Creation science," as the theory is popularly called, rejects evolution theory, research and documentation, and instead teaches that the world and humankind originated and developed by a divine act as recounted in the Book of Genesis. Creationists have focused their efforts on two fronts: pressuring publishers to include creation science in biology texts; and lobbying legislatures for state laws mandating or authorizing the teaching of creation science.

Hall v. Board of School Commissioners of Conecuh County, 656 F.2d 999 (5th Cir. 1981)

The Bible course challenged in *Hall*, entitled "Bible Literature," was approved by the Alabama State Board of Education as an elective to be offered in public high schools. Two books were used in the course: the Bible (usually the King James version, although no specific translation was required) and a state-approved text, *The Bible for Youthful Patriots*. Students who did not have Bibles were given copies donated by a citizen, which bore the inscription "Presented to [the student] by Repton High School." During the 1978-79 school year, Bible Literature was taught by a state certified teacher who was an ordained Baptist minister.

A lawsuit was filed by the parent of a student who enrolled in the course, alleging that the course materials and method of instruction constituted government support for proselytizing. In March, 1980, the U.S. District Court for the Southern District of Alabama dismissed the case for mootness, because the Bible course was not currently offered during the 1979-80 school year. The district court nevertheless offered the opinion that the plaintiff had not proved the unconstitutionality of the course.

On appeal, the plaintiff argued that it was only due to scheduling problems during the 1979-80 year that the course was not offered. The Fifth Circuit ruled in 1981 that because the school district had vigorously defended the course and made no intimation it would not be offered in the future, the issue was far from moot.

In reviewing the constitutionality of the course, the Fifth Circuit cited the district court's findings of fact:

> 10. The Bible Literature course consisted entirely of a Christian religious perspective and within that a fundamentalist and/or evangelical doctrine.
>
> 11. [Two expert witnesses] testified that the course materials, including the textbook, suggested a strong religious motivation as opposed to literary study. . . [and] a fundamentalist, evangelical Protestant perspective; that the primary effect of a course of study based on these materials would be to advance or study religion rather than the literary value of the Bible. *Hall*, 656 F.2d at 1001, 1002.

Further, the appellate court noted that expert witnesses had testified that course examinations, requiring rote memorization of the Bible, were inconsistent with the supposedly literary methodology of the course.

The Fifth Circuit concluded that these findings "clearly indicate the primary effect was the advancement of religion." 656 F.2d at 1002. On remand, the lower court was ordered to "fashion appropriate declaratory relief designed to prohibit use of *The Bible for Youthful Patriots* in the school and to ensure that any future course is taught within a secular framework focusing on the literary or historical aspects of the Bible, not the religious aspects." 656 F.2d at 1003.

Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983)

The Bible instruction challenged in *Crockett* had been offered at the elementary school level in Bristol, Virginia for over 40 years. A private group of ministers and lay representatives from various Protestant churches in Bristol raised funds for the course, employed teachers and supervised the instruction, exercising total control over the courses. Although not prescribed in the course outline, the King James version of the Bible was used for instructional purposes. At the time of litigation, the course consisted chiefly of Bible teaching and non-devotional music, the prayers and singing of hymns having been dropped from the program in 1982. In July, 1983, the U.S. District Court for the Western District of Virginia ruled the Bible instruction unconstitutional.

District Judge Jackson L. Kiser found that a certain amount of peer pressure was exerted on students to enroll in the Bible class. During the 1982-83 school year, 571 of 589 students in fourth and fifth grade elected to take the "voluntary" course. The court noted that for some children this peer pressure "is keenly felt in a negative way of making them feel ostracized from their fellow classmates who are enrolled in the Bible class." 568 F. Supp. at 1424.

In analyzing the course, the court first recognized the value and influence of the Bible in art, language, popular culture, Anglo-American law, and the founding and development of the United States. Citing illustrations for these points, the court found it significant "that President Ronald Reagan, on February 3, 1983, issued a proclamation declaring 1983 the 'Year of the Bible' in recognition of the Bible's fundamental and enduring influence on our country." 568 F. Supp. at 1428. Further, the district court noted that numerous references to the Bible in the Scholastic Aptitude Test (SAT) and in textbooks show that secular education "demands that the student have a good knowledge of the Bible." 568 F. Supp. at 1429.

In light of longstanding Supreme Court precedent holding that religious practices in public schools violate the establishment clause, the district court determined that the appropriate issue here is whether the Bristol Bible course constituted a religious exercise. Reviewing one of the teacher's lessons on the ascension of Jesus, the court found that "[c]onsidering the subject matter being taught, the lessons were presented in an objective manner. . . . No attempt was made by the teachers to indoctrinate the students in the tenets of any religious faith." 568 F. Supp. at 1430.

Nonetheless, the court concluded that the Bristol Bible course was an unconstitutional advancement of religion. Rejecting defendants' assertions to the contrary, the court held that "the program was originally designed to inculcate religious beliefs in the students." *Id.*

> One would be hard-pressed to find that a program which had been in place for 40 years under the sponsorship of Protestant churches which prescribed the curriculum, selected, supervised and paid the teachers, included prayers and hymns in the classes, and which has not been subject to the control and supervison of secular authority can be an objective academic course of Bible study. *Id.*

Despite a teacher's efforts to present the material objectively, Judge Kiser declared, "there is no way she could overcome the perceived aura that the classes are religious in nature." *Id.*

The district court did not conclude its opinion with the determination that the Bible class, as taught, violated the establishment clause. Instead, District Judge Kiser issued a set of guidelines under which a Bible course could be constitutionally taught in public school. First and fore-

most, the course must be supervised and controlled by the school board in regard to the hiring and firing of teachers, prescription of curriculum and selection of teaching materials. The course must be offered as an elective with reasonable alternatives for students choosing not to take the class. Although the school may solicit contributions to cover the cost of the Bible course, the donations should be received "with no strings attached." 568 F. Supp. at 1431. Finally, Judge Kiser stated that the "course should be taught in an objective manner with no attempt made to indoctrinate the children as to either the truth or falsity of the biblical materials." *Id.*

McLean v. Arkansas School Board of Education, 529 F. Supp. 1255 (E.D. Ark. 1982)

In 1981, Arkansas enacted a law which stated: "Public schools. . .shall give balanced treatment to creation-science and to evolution-science." Less than one year later, a federal district court struck down the law as an unconstitutional establishment of religion.

District Judge William Ray Overton's opinion began by relating the history of fundamentalism and the movement to promote creation science which preceded the enactment of Arkansas Act 590. The court described creationism as the "belief in the inerrancy of the Genesis story of creation and of a worldwide flood as fact." 529 F. Supp. at 1260. The court cited correspondence from the drafter of the Arkansas bill which showed "an awareness that Act 590 is a religious crusade coupled with a desire to conceal this fact." 529 F. Supp. at 1261. In addition, the legislative sponsor of the statute stated that it is compatible with his belief in the literal interpretation of the Bible and that his religious convictions were a factor in his sponsorship of the bill.

These facts, coupled with the lack of any legislative investigation, debate, or consultation with any educators or scientists, the bill's "unprecedented intrusion into school curriculum," and Arkansas' history of creation science and Bible reading legislation, led the court to conclude that Act 590 was passed "with the specific purpose by the General Assembly of advancing religion." 529 F. Supp. at 1264.

After an extensive review of the religious origins and underpinnings of creationism, Judge Overton came to the conclusion that "creation science has no scientific merit or educational value as science.... Since creation science is not science, the conclusion is inescapable that the *only* real effect of Act 590 is the advancement of religion." 529 F. Supp. at 1272.

Finally, the court found that since the only source of information on creationism is the Book of Genesis, it would be impossible to teach the subject in a secular manner. In addition, the need to monitor textbooks and classroom discussion for impermissible religious references would result in excessive and prohibited entanglement between government and religion.

Rejecting arguments by the defendants that school curriculum should reflect subjects which the majority of the public wants taught, the court concluded by stating unequivocably:

> The application and content of First Amendment principles are not determined by public opinion polls or by a majority vote. Whether the proponents of Act 590 constitute the majority or the minority is quite irrelevant under a constitutional system of government. No group, no matter how large or small, may use the organs of government, of which the public schools are the most conspicuous and influential, to foist its religious beliefs on others. 529 F. Supp. at 1274.

II. GOVERNMENT AID TO PAROCHIAL SCHOOLS

Legal battles over federal and state aid to parochial schools have occupied the courts since 1947, when the Supreme Court upheld New Jersey's provision of bus transportation for parochial students. *Everson v. Board of Education*, 330 U.S. 1 (1947). Since that decision, the Court's pronouncements on parochiaid have become increasingly complex—evidence of the difficulty in this area of drawing constitutional lines between permissible and impermissible government activity.

In *Board of Education v. Allen*, 392 U.S. 236 (1968), the Court upheld state loans of textbooks to parochial school students. However, in a subsequent case the Court struck down direct state loans of instructional materials and equipment to nonpublic schools. *Meek v. Pittenger*, 421 U.S. 349 (1975). In *Meek*, the Court also held it unconstitutional for a state to provide auxiliary services at church-related schools, consisting of counseling, testing and psychological services; speech and hearing therapy; teaching and related services for exceptional children, remedial and educationally disadvantaged students. Two years later, government financing of speech, hearing and psychological services, classes for the disabled, and guidance counseling for parochial students was held permissible if provided off parochial school premises. *Wolman v. Walter*, 433 U.S. 229 (1977). The Court also ruled, in *Wolman*, that state-financed *diagnostic* services, *i.e.*, speech, hearing, psychological, could be constitutionally

provided on-site in parochial schools.

These cases demonstrate the intricacies of Supreme Court case law regarding parochiaid. Each decision is narrowly limited to the specific statute or program before the Court, so that there are few basic ground rules. As states attempt to devise permissible aid programs, the issues continue to be litigated. The cases detailed below indicate that the controversy over parochiaid is far from settled.

Mueller v. Allen, 103 S. Ct. 3062 (1983)

Tuition tax relief statutes have been a persistently popular scheme for assisting parochial schools and students. Whether in the form of tax credits or income deductions, these statutes reimburse parents for tuition and other expenses incurred in sending children to nonpublic schools. In *Mueller*, the Supreme Court upheld a Minnesota statute which authorizes deductions for state income tax purposes for tuition, textbooks and transportation expenses incurred by any taxpayer. Although the statute appears, on its face, to apply neutrally to all parents, the deductible expenses are normally incurred only in connection with private schools, 90% of which, in Minnesota, are parochial.

The Court, in a 5-4 decision, analyzed the statute under the tripartite test. Writing for the majority, Justice Rehnquist first identified several legitimate secular purposes in according tax benefits to parochial schools, including the notions that private schools offer "wholesome competition" to public schools and may "relieve substantially the tax burden incident to the operation of public schools." 103 S. Ct. at 3067.

In considering the effect of the Minnesota statute, the Court found significant the fact that tax deductions were available to *all* parents. The Court used this factor to distinguish *Mueller* from the New York statute struck down in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). The New York statute authorized cash reimbursement and tax deductions for educational expenses incurred by parents of nonpublic school students.

Rejecting claims that the Minnesota statute, as applied, primarily benefits religious institutions because the bulk of deductions under the law are claimed by parents of parochial students, the Court stated that reliance on statistical data "would scarcely provide the certainty that this field stands in need of. . . ." 103 S. Ct. at 3070.

Finally, Justice Rehnquist determined that no excessive entanglement resulted from operation of the statute. State officials are required to disallow deductions for textbooks "used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship." These decisions, according to the Court, are similar to those required under the statute upheld in *Board of Education v. Allen*, 392 U.S. 236 (1968).

In a strong dissent joined by Justices Brennan, Blackmun and Stevens, Justice Marshall criticized the majority for upholding a statute which "has a direct and immediate effect of advancing religion." 103 S. Ct. at 3072 (Marshall, J., dissenting).

School District of the City of Grand Rapids v. Ball, 718 F.2d 1389 (6th Cir. 1983), *cert. granted*, 104 S. Ct. 1412 (1984)

The programs at issue in this case consist of two state-financed education projects offered to nonpublic elementary and secondary schools located within the Grand Rapids School District. "Shared time" is a program wherein the school district offers substantive courses from its general curriculum to private school students during regular school hours on the grounds of the private school in classrooms "leased" to the school district. The teachers in the program are employed and paid by the city. The "community education" program is similar to the shared time program in that it involves the teaching of private school students by publicly paid teachers on the premises of the private school. Unlike shared time, however, the community education offerings are scheduled either after or immediately preceding the regular school day.

The shared time and community education programs were challenged in a suit filed in the U.S. District Court for the Western District of Michigan by six taxpayers seeking a declaration that the Michigan legislature's authorization of funding for the programs violates the establishment clause of the First Amendment.

In August, 1982, the district court ruled the programs unconstitutional under the tripartite test enunciated by the Supreme Court. First, the court recognized that the state had a legitimate secular purpose in providing the best possible educational opportunities for all students. However, the court stated that regardless of the good faith and integrity of the teachers, the programs have a primary effect of advancing religion. Finally, the court held that the programs result in excessive government entanglement with religion because of the political divisiveness engendered in the community by the programs and through the administration of the programs.

The defendant school district appealed this decision to the U.S. Court of Appeals for the Sixth Circuit, which affirmed the judgment of the lower court on the basis of the tripartite analysis. Largely

relying on the district court's reasoning, the Sixth Circuit found that the educational programs unconstitutionally advance religion and foster excessive entanglement between the government and religion.

The Sixth Circuit noted several factors which distinguish the Michigan programs from government aid found constitutional by the Supreme Court:

> First, this program is primarily a program of assistance to elementary schools; second, this program is one which gives substantial financial aid to education in parochial school buildings, third, the parochial schools concerned have religious indoctrination as a primary school purpose; fourth, the impact upon taxpayers and the parochial schools is direct. 718 F.2d 1389, 1405 (footnotes omitted).

Finally, the Sixth Circuit distinguished this case from *Mueller v. Allen*, in which the Supreme Court upheld state tuition tax deductions which defrayed expenses of parochial school education in Minnesota. In *Mueller*, the Supreme Court relied, among other things, on the fact that the Minnesota tax statute aided the *parents* of the school children involved, rather than the parochial schools themselves. By contrast, the Sixth Circuit found, the Michigan education programs at issue "clearly give direct aid to parochial schools in parochial school buildings. By so doing, they also assist those schools in performing their religious missions, in violation of the First Amendment." 718 F.2d at 1406.

In conclusion, the appellate court held that if the Michigan programs were approved, state legislatures, bending to pressure from "religious constituencies," would allocate increasing shared time and community education funds until the "great majority of parochial school costs will be carried by taxpayers." *Id.*

The school district's petition for *certiorari* was granted on February 27, 1983. In their appeal, the petitioners characterize the shared time and community education programs as supplemental secular instructional services which occur under conditions of exclusive public school control and which are offered to parochial students who the school district denotes as "part time public students." The school district argues that, in the absence of any evidence showing abuses during the four-year operation of the programs, the lower courts erred in striking down the programs.

Felton v. Secretary, U.S. Department of Education, No. 83-6359 (2d Cir. July 9, 1984), *appeal docketed*, 53 U.S.L.W. 3134 (Aug. 10, 1984) (Nos. 84-237, 238, 239)

On July 9, 1984, the Second Circuit Court of Appeals ruled that New York City's use of federal funds for remedial education of parochial school students by public employees in parochial schools violates the establishment clause. The federal funds at issue in *Felton* are authorized by Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §2701 *et. seq.*, in order to provide auxiliary services to educationally deprived low income students, in public and private schools. New York City's Title I program provides remedial reading, reading skills centers, remedial mathematics, English as a second language, guidance counseling and speech therapy. These services are provided in parochial schools to qualified students by Title I professionals who are employees of New York City.

In 1980, the U.S. District Court for the Southern District of New York upheld the constitutionality of Title I and New York City's program against a challenge by the National Coalition for Public Education and Religious Liberty ("PEARL"). *PEARL v. Harris*, 489 F. Supp. 1248 (S.D.N.Y. 1980), *appeal dismissed for want of jurisdiction*, 449 U.S. 808 (1980).

While the *PEARL* suit was pending, Betty Louise Felton and five other taxpayers brought a collateral challenge to the constitutionality of New York City's Title I program in the U.S. District Court for the Eastern District of New York. In October, 1983, District Judge Edward R. Neaher held Title I and the City's program constitutional, virtually incorporating the decision of the three-judge panel in *PEARL v. Harris*. The *Felton* decision was appealed to the Second Circuit, which reversed the lower court on July 9, 1984.

The Second Circuit based its ruling on a finding that New York City's Title I program impermissibly entangled government and religion. Despite the appearance of safeguards by New York City, *i.e.*, religious symbols could not be placed in Title I classrooms, the appellate court found that there was a significant risk that the Title I professionals would, unwittingly, foster religion. Many Title I professionals work in schools with religious affiliations identical to their own. In addition, the purpose of many of the schools is the inculcation of religious values. Operating in this "sectarian milieu," even the "good faith" of Title I teachers cannot guarantee neutrality. The Second Circuit concluded that "public funds can be used to afford remedial instruction or related counseling services to students in religious elementary and secondary schools only if such instruction or services are afforded at a neutral site off the premises of the religious school." Slip op. at 34.

The Second Circuit decision has been appealed to the Supreme Court. If the Court reviews the case, it is possible that it will consoli-

date *Felton* with another case pending before the Court. At issue in *School District of the City of Grand Rapids v. Ball*, discussed above, is the constitutionality of publicly funded supplemental education courses on parochial school premises. The Court may consolidate *Ball* with *Felton*, because of the similarity of the fact patterns, in order either to hand down a broad ruling which encompasses both situations, or to differentiate factors which dictate contrary rulings.

III. DISPLAY OF RELIGIOUS SYMBOLS ON PUBLIC PROPERTY

Until recently, controversies over public displays of religious symbols rarely reached the courts, because most communities settled the conflicts locally without litigation. In the last few years, however, that trend has changed, resulting in several federal court decisions and a major ruling by the Supreme Court. The cases described below indicate that further litigation is likely. The Supreme Court's ruling on a municipally sponsored Nativity Scene left open many questions, and controversies continue to arise.

American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, 678 F.2d 1379 (11th Cir. 1982), *aff'd on rehearing*, 698 F.2d 1098 (11th Cir. 1983)

Rabun involved a constitutional challenge to a large, lighted Latin cross erected in Black Rock Mountain State Park with the approval of the State of Georgia. The Rabun County Chamber of Commerce took full responsibility for the construction and maintenance expenses of the cross, which was dedicated on Easter morning at sunrise services.

After receiving objections from the ACLU of Georgia, the State Department of Natural Resources ordered the Chamber of Commerce to remove the cross from state property. When the Chamber refused and the state made no effort to remove the cross, the ACLU filed suit in the U.S. District Court for the Northern District of Georgia. On March 26, 1981, the district court ruled that the ACLU and five individual plaintiffs had standing* to challenge the cross and held the display violative of all three prongs of the tripartite establishment clause test.

On appeal, the issue of standing was again raised. The Eleventh Circuit ruled that at least two of the plaintiffs had standing to challenge the cross because they had demonstrated that the presence of the illuminated cross in the state park "forced [them] to locate other camping areas or to have their right to use Black Rock Mountain State Park conditioned upon the acceptance of unwanted religious symbolism." 698 F.2d at 1108.

Turning to the merits of the establishment clause claim, the Eleventh Circuit affirmed the lower court's ruling. On appeal, the defendants had argued that the cross was erected for the secular purpose of promoting tourism. The Eleventh Circuit found that the lower court's finding of a religious purpose was amply supported by evidence at trial. Witnesses had testified that "the Latin cross is universally regarded as the symbol of Christianity." 698 F.2d at 1110-1111. The appellate court further found:

> Moreover, the selecting of an Easter deadline for completion of the cross, the decision to dedicate the cross at Easter Sunrise Services, and the several inspirational statements contained in the Chamber's press releases all point to the existence of a religious purpose. 698 F.2d at 1111.

The Court of Appeals noted that even if the purpose of the cross was to promote tourism, this would not avoid conflict with the establishment clause, since "a government may not 'employ religious means to reach a secular goal unless secular means are wholly unavailing.'" 698 F.2d at 1111 (quoting *Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

The Eleventh Circuit concluded that neither "historical acceptance" nor the argument that the lighted cross represents only a "minor encroachment" on establishment principles saves the religious symbol from constitutional attack, for the "breach of neutrality that is today a trickling stream may all too soon become a raging torrent." *Id.* (quoting *Schempp*, 374 U.S. at 225).

Goldstein v. Fire Department of the Village of Suffern, 559 F. Supp. 1089 (S.D.N.Y. 1983)

In 1981, the Suffern Fire Department voted to include a sign containing the message "Keep Christ in Christmas" in the firehouse Christmas

*In order to satisfy the requirements of Article III of the U.S. Constitution, limiting federal court jurisdiction to "cases or controversies," a plaintiff must demonstrate that [s]he has a personal stake in the outcome of litigation. In establishment clause cases, the Supreme Court has ruled that neither a "mere spiritual stake in the outcome nor an intense commitment to separation of church and state" is sufficient to demonstrate standing. *Rabun*, 698 F.2d at 1103 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 102 S. Ct. 752, 765-766 (1982)). Instead, plaintiffs must show an actual (even if noneconomic) personal injury.

decorations. After receiving a complaint from a Suffern resident, Sheldon Goldstein, the Village Board of Trustees met to discuss the matter, but failed to pass a motion to remove the sign. The sign measured two feet by six feet and hung on the front of the firehouse from December 12, 1981 until January 10, 1982. Goldstein and several other individuals brought suit in federal court challenging the constitutionality of the Village's sign.

On April 12, 1982, the U.S. District Court for the Southern District of New York held that the sign violated the establishment clause, on the basis of the "purpose" prong of the tripartite test, and granted summary judgment to the plaintiffs.

The Village officials had claimed the secular purpose of encouraging citizens to divorce themselves from the commercialism associated with the Christmas season. Even assuming that such a purpose is valid under the establishment clause, the court found that the defendants had carried it out through a means which "clearly refers to the Christian theory of Christmas. In fact, the sign created the obvious impression that defendants either were promoting or approving of the theological origins of Christmas." 559 F. Supp. at 1391. The district court concluded that this purpose "cannot validate the obvious conflict with the First Amendment." *Id.*

Lynch v. Donnelly, 104 S. Ct. 1355 (1984)

On March 5, 1984, the U.S. Supreme Court, by a vote of 5-4, upheld the constitutionality of a life size Nativity Scene, owned and erected by the city of Pawtucket, Rhode Island as part of its annual Christmas display for the last 40 years.

The Nativity Scene display was challenged by a group of taxpayers and the Rhode Island affiliate of the American Civil Liberties Union. After a three day trial, which not only included expert witnesses on the religious symbolism and the significance of Nativity Scenes, but also a personal view of the display by the court, a federal district court held for the plaintiffs. *Donnelly v. Lynch*, 525 F. Supp. 1150 (D.R.I. 1981). The court found that Pawtucket's inclusion of a Nativity Scene in its Christmas display violated the establishment clause in that the display had a clearly religious purpose, a primary effect of advancing religion and entangled government and religion.

The First Circuit Court of Appeals affirmed. *Donnelly v. Lynch*, 691 F.2d 1029 (1st Cir. 1982). The appellate court held that government ownership and sponsorship of a Nativity Scene depicting the biblical birth of the Christian Messiah must be analyzed under the *Larson* "strict scrutiny" test, applicable when government discriminates among religions, rather than the tripartite test applied by the district court.* However, the First Circuit held that under either test, the display could not pass constitutional muster.

After the Supreme Court granted *certiorari*, the first time it had ever agreed to review a case involving a publicly sponsored religious display, the U.S. Solicitor General was given permission to file an *amicus* brief on behalf of the United States supporting the constitutionality of the Nativity Scene. The government's brief, relying on the Supreme Court's "historical" analysis of the Nebraska chaplaincy in *Marsh v. Chambers*, 103 S. Ct. 3330 (1983),† emphasized the role of Christmas as a national holiday in American culture.

The Court's majority opinion, delivered by Chief Justice Burger and joined by Justices White, Powell, Rehnquist and O'Connor, was based in large part on the brief of the U.S. Solicitor General and rested on the recognition of Christmas as a national holiday. Chief Justice Burger likened this to other instances of government acknowledgement and commemoration of religion: Thanksgiving Day, legislative chaplaincies, the use of "In God We Trust" as a motto on U.S. currency, the language "one nation under God" in the Pledge of Allegiance, congressional chapels in the Capitol; and the Ten Commandments which decorate the chamber of the Supreme Court. Throughout the opinion, the majority also drew an analogy between Pawtucket's Nativity Scene and the display of religious paintings in the government sponsored National Gallery.

These instances of government "accommodation" of religion, according to Chief Justice Burger, are part of this country's "heritage" and preclude a rigid, absolutist view of the establishment clause. Instead, the majority declared that the Court "has scrutinized challenged legislation or official conduct to determine whether *in reality*, it establishes a religion or religious faith, or tends to do so." 103 S. Ct. at 1361. Conceding that

---

*In *Larson*, the Supreme Court struck down a Minnesota charitable solicitation registration statute which exempted religious organizations receiving more than 50% of their contributions from non-members. The Court held that any statute or practice which explicitly discriminates among religions must be invalidated unless it is justified by a compelling state interest and is narrowly tailored to serve that interest. *Larson v. Valente*, 456 U.S. 228, 246-252 (1982).

†In *Marsh*, the Supreme Court upheld Nebraska's sixteen year employment of a Presbyterian minister to open legislative sessions with a prayer. The Court's ruling essentially relied on the fact that legislative chaplains had been approved by the First Congress in 1789 and had continued uninterrupted since that time.

this inquiry requires a case-by-case determination, the Court stated it has "often found it useful" to apply the *Lemon* tripartite test. *Lynch*, 103 S. Ct. at 1362.

Despite the Court's halfhearted endorsement of the *Lemon* test, the majority did apply it, with modifications, to the Pawtucket Nativity Scene, emphasizing that the focus of the Court's inquiry must be on the creche in the context of the Christmas season. Holding that the existence of *any* secular purpose is sufficient to satisfy the first prong of the test, the Court declared that the city's objectives of celebrating Christmas and depicting the holiday's origins are "legitimate secular purposes." *Id.* at 1363. Next, the majority concluded that any benefit to religion is:

> indirect, remote and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums. 103 S. Ct. 1355, 1364.

Turning to the entanglement inquiry, the majority found that the display requires "far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries" and that there was no evidence of political divisiveness in Pawtucket prior to the litigation. *Id.*

The majority concluded by reiterating the syllogism which served as the theme of the opinion: 1) Christmas is a legally recognized national holiday; 2) the creche is part of a display celebrating that holiday; 3) given the unquestioned acceptability of Christmas as a national holiday, and the inclusion of the creche in the context of that holiday, government sponsorship of the creche is constitutional.

Justice O'Connor's concurring opinion stated that the "establishment clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." 103 S. Ct. at 1366 (O'Connor, J., concurring). There are two ways in which government can run afoul of that prohibition: 1) excessive institutional entanglement, or 2) endorsement or disapproval of religion. The Pawtucket creche engenders no entanglement according to Justice O'Connor, making the central issue in the case "whether Pawtucket has endorsed Christianity." *Id.* at 1367.

Despite her apparent sensitivity to the potential message which government sends to its citizens by endorsing religion, Justice O'Connor declared:

> Although the religious and indeed sectarian significance of the creche, as the district court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display [of the creche] celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. 103 S. Ct. at 1369.

The main dissenting opinion by Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, focused on the religiosity of the creche and a determination that legitimate secular goals—such as promoting commerce during the holiday season—could have been served by alternate means. Justice Brennan criticized the syllogism posed by the majority, arguing that even if the designation of Christmas as a public holiday is constitutionally acceptable, it does not follow that every form of governmental association with the celebration of that holiday is also constitutional. In strong language, Justice Brennan described the creche and the effect of Pawtucket's display:

> I refuse to accept the notion implicit in today's decision that non-Christians would find that the religious content of the creche is eliminated by the fact that it appears as part of the City's otherwise secular celebration of the Christmas holiday.
>
> . . .
>
> It is the chief symbol of the characteristically Christian belief that a divine Savior was brought into the world and that the purpose of this miraculous birth was to illuminate a path toward salvation and redemption. For Christians, that path is exclusive, precious and holy. But for those who do not share these beliefs, the symbolic reenactment of the birth of a divine being who has been miraculously incarnated as a man stands as a dramatic reminder of their differences with Christian faith.
>
> . . .
>
> To be so excluded on religious grounds by one's elected government is an insult and an injury that, until today, could not be countenanced by the Establishment Clause. 103 S. Ct. at 1377 (Brennan, J., dissenting).

Despite the sweeping language of Chief Justice Burger's majority opinion, the *Lynch* deci-

sion did not completely resolve the issue of public religious displays. As the cases below indicate, variations on the nature of a religious display, the sponsor, the setting and location of the display must be analyzed against the facts of *Lynch*. In the following case, *McCreary v. Stone*, the Second Circuit relied on *Lynch* in a ruling which sanctioned a privately sponsored creche on public property. In the *Eckels* and *Birmingham* cases, however, two federal district courts distinguished *Lynch* and struck down religious displays on public property.

McCreary v. Stone, No. 83-9052 (2d Cir. June 21, 1984), *cert. petition filed*, 53 U.S.L.W. 3161 (Aug. 17, 1984) (No. 84-277)

In recent years, efforts by a group of citizens to place a privately owned creche on public park property in the Village of Scarsdale have caused much dispute. In 1981 and 1982, the Village denied its permission to display the Nativity Scene. A group of individuals formed the Scarsdale Creche Committee to challenge the Village's denial, claiming that it constituted a violation of their free exercise and free speech rights.

U.S. District Judge Charles E. Stewart, Jr., of the Southern District of New York, ruled against the plaintiffs on December 8, 1983. The district court first found that the Village's denial in no way implicated plaintiffs' free exercise rights. According to Judge Stewart, the display of a creche has no significance to the practice of any religion. Furthermore, even if it did, there were many alternative private sites available to plaintiffs.

Judge Stewart based his analysis on the free speech claim in *Widmar v. Vincent*. Boniface Circle, where the plaintiffs sought to place the creche, is a public park, traditionally held to be a public forum. Therefore, under the First Amendment, religious speakers have an unfettered right to express themselves on that site. However, in this case, unlike *Widmar*, the district court held that establishment clause principles constituted a compelling state interest which justified an infringement of that free speech right. When public property is used for the display of unattended religious symbols, the court held in distinguishing *Widmar*, the speaker appears to be the government. This apparent government endorsement of religious speech contravenes establishment principles barring government imprimatur or approval of religion. The district court decision was appealed by the Scarsdale Creche Committee to the Second Circuit.

The significance of the Scarsdale case is seen in the context of the recent *Lynch v. Donnelly* decision. The Scarsdale creche differs from the Pawtucket display in several significant respects. First, the Scarsdale Creche Committee seeks to display a privately owned Nativity Scene on public property—exactly opposite to the situation in *Lynch v. Donnelly*. Second, the Scarsdale display consists solely of a Nativity Scene, without the presence of nonreligious symbols which possibly neutralize the effect of the creche. On appeal, however, these factual differences were insufficient to distinguish the Scarsdale creche from the display upheld in *Lynch*.

On June 21, 1984, the Second Circuit Court of Appeals ruled that a privately sponsored display of a Nativity Scene in a public park does not amount to government endorsement of religion and is therefore permissible under the establishment clause. Relying primarily on *Lynch v. Donnelly*, the appellate court ruled that the creche could be erected for a short time during the Christmas season as long as a disclaimer sign was properly displayed.

In reaching its decision, the appellate court agreed with the district court that Boniface Circle is traditionally a public forum available to a broad range of Scarsdale's organizations and individuals, religious and nonreligious. According to the court, this was an important index of secular effect which tends to diminish any government advancement of religion.

The court found that any benefits from a creche display on public property which accrue to religion are at most incidental, and determined that "the Village's actions in permitting access to Boniface Circle for display of a creche—the same actions that would be necessary in permitting access for any display—do not lead it into such an intimate relationship with religious authority that it appears. . .to be sponsoring. . .that authority." *McCreary*, slip op. at 4683.

The Second Circuit rejected the argument that the Scarsdale creche, standing alone on public property and devoid of secular trappings, should be distinguished from the *Lynch* creche, which was displayed in a private park in the context of traditional and "nonsectarian" Christmas trappings, including plastic animals and a large banner that read "Seasons Greetings." The Second Circuit interpreted the *Lynch* opinion as focusing on the creche in the context of the *Christmas season*, rather than the *physical context* of the display. Additionally, the Second Circuit found that the Christmas celebration in Scarsdale did not differ significantly from the celebration described in *Lynch*. The court noted that the Village of Scarsdale has been decorated with numerous traditional symbols of Christmas. More importantly, Boniface Circle has been the site of a Christmas carol program for several years and has been decorated with Christmas ornaments by the Chamber of Commerce.

Despite the Second Circuit's ruling that the Scarsdale Board of Trustees may not rely on the establishment clause in prohibiting the Nativity

Scene, the court recommended a disclaimer sign:

> We believe that a proper disclaimer message—especially when coupled with the presence of the valid secular purpose, the lack of excessive entanglement, the Village's general grants of access to its public properties and the publicity the Village's official views have received in Scarsdale—will ensure that no reasonable person will draw an inference that the Village supports any church, faith or religion associated with the display of a creche during the Christmas season at Boniface Circle.

The Village of Scarsdale has applied to the Supreme Court to review the decision.

Greater Houston Chapter of the American Civil Liberties Union v. Eckels, No. H-82-0035 (S.D. Tex. May 22, 1984)

On May 22, 1984, U.S. District Judge Carl O. Bue, Jr., of the Southern District of Texas, held that a display of three Latin crosses and a Star of David constructed and maintained in a public park, violated the establishment clause. The controversy began in 1980 when the Harris County Commissioner, Robert Eckels, acceded to requests from constitutents that three crosses be erected in an area of Bear Creek Park which was to be devoted to personal reflection or meditation. A Star of David was later added to the display, also at county expense, at the request of several Jewish constituents. When the local chapter of the American Civil Liberties Union questioned the constitutionality of the county's actions, Eckels personally reimbursed the county for the construction costs of the religious symbols.

Several taxpayers and citizens filed suit against Eckels in January, 1982 seeking removal of the crosses and Star of David. After the trial, District Judge Bue deferred his ruling pending the Supreme Court's decision in *Lynch*.

Reviewing the *Lynch* opinion and prior Supreme Court precedent, the district court was unsure as to the proper standard for review of establishment clause cases. The court, therefore, analyzed the facts of *Eckels* under the tripartite test, the "historical" inquiry of *Marsh v. Chambers*, 103 S. Ct. 3330 (1983), and the "strict scrutiny" test of *Larson v. Valente*, 456 U.S. 228 (1982), reaching the same result under all three tests.

First, under the tripartite analysis, the court held that no valid secular purpose was offered for the display. Eckels had initially stated that the purpose was to designate an area of the park for meditation. After litigation began, he argued that the display was planned as part of a war memorial. The district court rejected this claim. Assuming the legitimacy of a government sponsored war memorial, the display of crosses and a Star of David was impermissible because the establishment clause does not allow the state to use religious means in order to achieve secular goals. Further, the court found it significant that Eckels had expressed concern for the spread of Secular Humanism and the preservation of the country's Judeo-Christian heritage, in a letter written after the displays were challenged.

The district court also found that the primary effect of the display is religious.

> That the cross and the Star of David are the primary symbols of Christianity and Judaism respectively is beyond question.
>
> . . .
>
> These permanent symbols become state symbols when placed in a public park, and they convey purely religious messages.
>
> . . .
>
> Further, even if one strains to view the symbols in the context of a war memorial, their primary effect is to give the impression that only Christians and Jews are being honored by the county. Slip op. at 30-31.

Applying the "historical analysis" of *Marsh* to the facts at issue, the district court concluded that the religious symbols could not be upheld because "there is no history or pattern of their use in public parks for commemorating the war dead." Slip op. at 36.

Finally, applying the *Larson* test, the district court ruled that Eckels, in advancing two selected religious beliefs, had failed to satisfy the strict scrutiny analysis. Even accepting the sincerity of Eckel's asserted purpose, the court held that the county's need to memorialize its war veterans was not a compelling interest. Furthermore, even if one characterized the need for a war memorial as compelling, the selection of Christian and Jewish symbols was not closely tailored to serve that interest.

Following his establishment clause analysis, Judge Bue dismissed Eckel's claim that removal of the religious symbols would result in the establishment of the non-theistic religion of Secular Humanism. This argument was considered and rejected by the Supreme Court in *Schempp*, 374 U.S. 306 (1963). The district court ruled that ordering the removal of the symbols established nothing more than constitutional neutrality. Judge Bue concluded that "[c]ontrary to the principle of majority rule, the law is clear that the Constitution safeguards the rights of minorities—in this case the rights of those who are not Christians and Jews." Slip op. at 41-42.

American Civil Liberties Union v. City of Birmingham, No. 83-CV-3348 (E.D. Mich. July 23, 1984)

In a brief opinion issued July 23, 1984, Federal District Judge Anna Diggs Taylor of the Eastern District of Michigan struck down a Nativity Scene displayed on the lawn of the Birmingham City Hall, granting summary judgment to plaintiffs who challenged the display as violative of the establishment clause. Judge Taylor's ruling distinguished the case from *Lynch* in several respects and held that the Birmingham creche was unconstitutional under the tripartite analysis.

Unlike the Nativity Scene at issue in *Lynch*, the Birmingham creche was displayed on public property and stood alone, rather than being surrounded by other arguably nonreligious holiday symbols. The district court ruled that there was no secular purpose for the creche display on the City Hall property. Without extensive analysis, the court also found that the primary effect of the display "can only be to advance, affirm, approve, or otherwise validate the Christian religion. . . ." Slip op. at 5. Finally, the court held that, while the display did not appear to engender excessive entanglement between government and religion, it is a source of political divisiveness.

The court concluded its opinion with this observation:

> This is not a case of including a creche. This is the presentation of the creche alone, which is the message that this is a Christian City. This is violative of the Establishment Clause, and must be prohibited. Slip op. at 6.

The City of Birmingham has indicated it will appeal Judge Taylor's decision to the Sixth Circuit.

IV. RELIGIOUS DISCRIMINATION AND ACCOMMODATION

The cases discussed in this section raise issues of discrimination on the basis of religion and accommodation of religious beliefs. Litigation in these areas arises because of the tension between an individual's freedom of religion, guaranteed by the First Amendment, and countervailing concerns of the government or an employer. In the private employment context, federal law prohibits discrimination based on religion and requires an employer to accommodate an employee's religious beliefs unless accommodation will cause undue hardship on the employer's business. In *Trans World Airlines v. Hardison*, the Supreme Court ruled that an accommodation which places more than a "*de minimus*" burden on an employer constitutes undue hardship. 432 U.S. 63, 84 (1977).

In situations involving state action, *i.e.*, a statute or government employer, infringement of an individual's free exercise rights can only be justified by a narrowly tailored, compelling governmental interest. Moreover, when state action is implicated, extended efforts to accommodate may infringe on establishment principles by advancing religion. Although this tension between discrimination and accommodation has been discussed in other sections, the cases described below bring the conflict into sharper focus.

A. Religious Discrimination in the Military

1. Cases

Goldman v. Secretary of Defense, 530 F. Supp. 12 (D.D.C. 1981), *vacated and remanded*, 734 F.2d 1531 (D.C. Cir. 1984), *petition for reh'g denied* (D.C. Cir. Aug. 10, 1984)

Captain Simcha Goldman, an Orthodox Jew, is a clinical psychologist assigned to March Air Force Base since September, 1977. From that date until May, 1981, Goldman wore a yarmulke at all times while on duty. Goldman had previously served as a chaplain in the Air Force, between 1970 and 1972. Goldman had never been told that wearing a yarmulke while in uniform was problematic, and throughout his service he received consistently outstanding evaluations from his superiors.

On May 8, 1981, Goldman was informed that wearing a yarmulke while in uniform violated Air Force regulations. He was told to cease wearing the yarmulke at all places except the hospital. Failure to obey this command, he was told, would subject him to a court-martial. Goldman refused to comply and was given a letter of reprimand and was threatened with additional sanctions including a court-martial. In addition, a positive recommendation that had been submitted in favor of Goldman's application for a one year extension of his service in the Air Force was withdrawn, and a negative performance evaluation submitted in its place.

Goldman filed suit in federal district court seeking a preliminary injunction enjoining enforcement of the Air Force regulations which prohibited wearing a yarmulke while in uniform. The Air Force asserted a military need for "uniformity" as its interest in enforcing the regulation. The U.S. District Court for the District of Columbia granted the injunction and ordered the Air Force to withdraw the letter of reprimand and negative evaluation.

Chief District Judge Aubrey E. Robinson, Jr. characterized the issues as requiring "an understanding of the parameters of both the Air Force authority to impose uniformity and an individual's right to freely exercise his religion." 530 F. Supp.

12, 15. The court held that Goldman's insistence on wearing a yarmulke, motivated by religious convictions, was protected by the First Amendment and that the Air Force had failed to show an interest which would outweigh his free exercise rights.

When the Air Force appealed this decision, the U.S. Court of Appeals for the District of Columbia reversed. The appellate court first addressed the proper level of scrutiny under which to examine the alleged constitutional violation. Goldman asserted that because a fundamental right guaranteed by the free exercise clause of the First Amendment was at stake, the Air Force regulation could be upheld only if it was narrowly drawn and justified by a compelling governmental interest. The Air Force argued that military judgments are entitled to special deference and, therefore, the regulation could be upheld as long as it was rational. The court held instead that it must determine whether "legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree." 734 F.2d 1531, 1536.

Under this analysis, the court examined the legitimacy of the rights asserted by both parties. Goldman's religious convictions were found to be sincere, despite the fact that the record established that not all observant Jews feel obliged to cover their heads at all times. Nevertheless, the court upheld the Air Force's interest in uniformity.

The Air Force had argued that "precise adherence to its uniform requirements were necessary to maintain teamwork, motivation, discipline, esprit de corps and image." *Id.* at 1538. While the appellate court noted that Air Force restrictions are not absolute, and make arbitrary exceptions for certain religious requirements, *i.e.*, Mormons are allowed to wear "temple garments" under their uniforms, the court essentially deferred to military judgment as to the necessity for dress regulations: "[The Air Force's] interest lies in the enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement." *Id.* at 1540. Rejecting Goldman's arguments that the regulations and their enforcement do not serve the Air Force's interest, the court concluded:

> The rules themselves are arbitrary, and are enforced up to an arbitrary cutoff point—the point of visibility. It is nearly inevitable that some religious practices will fall on one side of the line and some on the other. But the Air Force. . .concludes that strict enforcement of its regulations is necessary for its military purposes.
>
> Although Goldman raises serious questions concerning the restrictiveness of the Air Force's regulations and the manner of their enforcement, the Air Force's reasons for its rules, particularly in view of their specialized military nature, are sufficient answer. 734 F.2d at 1540-1541.

Goldman has indicated he plans to seek Supreme Court review of the appellate decision.

Bitterman v. Secretary of Defense, 553 F. Supp. 719 (D.D.C. 1982)

Murray Bitterman, a Jewish Air Force sergeant, became Orthodox after he joined the service, but prior to reenlistment in 1980. After the district court's decision in *Goldman*, enjoining the enforcement of the Air Force regulation prohibiting Goldman from wearing a yarmulke in uniform, Bitterman sought permission from his superior officer to wear a yarmulke while in uniform. When his request was denied, he filed suit in federal court.

Disagreeing with Judge Robinson's decision in *Goldman*, District Judge Oliver Gasch upheld the constitutionality of the Air Force regulation prohibiting Bitterman from wearing a yarmulke. As in *Goldman*, the Air Force asserted that the regulation furthered its interests in "teamwork, motivation, discipline, esprit de corps and image," which it identified as five major considerations in "establishing and maintaining a combat-ready fighting force." 553 F. Supp. at 721. Judge Gasch held that "the effective functioning and maintenance of the Air Force is a substantial compelling governmental interest" and ruled that the regulation was the "least intrusive means to achieve that interest." *Id.* at 724-725. Judge Gasch declared:

> In short, the Court agrees with the considered judgment of professional military officials, prompted by generations of experience in war and peace, that allowing departures from the uniformity standards of [the regulation] would adversely affect the promotion of teamwork, counteract pride and motivation, and undermine discipline and morale.... 553 F. Supp. at 724-725.

Finally, the court found that Bitterman's desire to wear a yarmulke "really constitutes a personal religious preference" and not a religious requirement. Therefore, the court concluded that if free exercise rights must be circumscribed to some degree, "it is preferable that the practice of a religious preference be circumscribed rather than the practice of a religious requirement." *Id.* at 726.

2. Federal Legislation

As a result of the Court of Appeals' decision in *Goldman*, Representative Stephen Solarz (D-

NY) introduced an amendment to the 1985 defense authorization bill allowing members of the armed forces, on a one year trial basis, to wear "unobtrusive religious headgear" if it is required by their religious observances and does not interfere with the performance of military duties. The amendment easily passed in the House of Representatives.

In the Senate, Orrin Hatch (R-UT) introduced an amendment to the 1985 defense authorization bill which establishes a Defense Department Joint Study Commission to make recommendations for changes in the uniform dress regulations to accommodate the religious needs of armed servicemen. The Commission is required to report back to the Senate by January 1, 1985. The floor debate that accompanied the introduction of this amendment made it clear that the Commission is expected to return with favorable recommendations.

The bill is currently in conference committee. Rep. Solarz has agreed to accept the Senate version, providing for a six month period of study.

B. Religious Discrimination in Public Schools

Menora v. Illinois High School Association, 683 F.2d 1030 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 801 (1983)

The Illinois High School Association ("IHSA") is a private association of the state's high schools (public and private), which conducts the interscholastic sports program. The IHSA forbids basketball players from wearing any headgear, other than a two-inch headband, while playing. This rule was challenged by a group of Orthodox Jewish males who argued that it infringed upon their right to freely exercise their religion because it prevented them from wearing yarmulkes. The IHSA argued that yarmulkes could pose a danger if they slipped off during a basketball game and caused other players to fall.

The U.S. District Court for the Northern District of Illinois held that the rule violated the First Amendment because the slight safety hazards posed by yarmulkes did not justify forcing the plaintiffs to choose between their religious observance or participating in interscholastic basketball. 527 F. Supp. 637 (N.D. Ill. 1981).

On appeal, the Seventh Circuit analyzed the nature of plaintiffs' asserted religious observance to determine if, in fact, a conflict with the IHSA's rule existed. The plaintiffs had agreed that the precise nature of the head covering and the method of keeping it on the head are not specified by Jewish law. In this case, the IHSA had prohibited the players from wearing yarmulkes insecurely fastened by bobby pins. The appellate court held that this interpretation of the IHSA rule, based on the need to ensure safety, did not infringe on any constitutional rights of the plaintiffs.

Rather than ordering the lower court to dismiss the complaint, however, the Seventh Circuit ruled that the plaintiffs should "have an opportunity to propose to the Association a form of secure head covering that complies with Jewish law yet meets the Association's safety concerns." 638 F.2d 1030, 1035.

C. Sabbath Observer Rights

Anderson v. General Dynamics Convair Aerospace Division, 648 F.2d 1247 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982)

David Anderson was first employed by General Dynamics in 1956. In 1959, he became a member of the Seventh-Day Adventist Church and subscribed to the church's belief that its members should not join or financially support labor organizations. In 1972, General Dynamics and the International Association of Machinists and Aerospace Workers, AFL-CIO, entered into a collective bargaining agreement which required that all employees in Anderson's job category become members of the union as a condition of continued employment. Anderson refused to join the union because of his religious beliefs. He informed the company and the union of this proscription and offered to pay an amount equal to the union dues to a mutually acceptable nonreligious charity. The union refused and Anderson was subsequently fired for failure to comply with the collective bargaining agreement.

Anderson sued both General Dynamics and the union under Title VII claiming that he was discharged in violation of the religious discrimination provisions of the Civil Rights Act of 1964. Section 701(j) of the Act requires an employer to make a "reasonable accommodation" for an employee's religious practices unless it places an "undue hardship" on the conduct of the employer's business. 42 U.S.C. §2000e(j).

The U.S. District Court for the Southern District of California ruled that the charity substitution payment imposed an undue hardship on the union. 430 F. Supp. 418 (S.D. Cal. 1977). The Ninth Circuit Court of Appeals reversed and remanded, finding that the employer and union had failed to prove they could not accommodate Anderson without undue hardship. 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

On remand, however, the company and the union asserted, for the first time, that section 701(j) was unconstitutional under the establishment clause of the First Amendment. The district court held that section 701(j) lacked a secular purpose, required an overt preference for the religious

beliefs of certain employees, thereby advancing religion, and excessively entangled government with religion. 489 F. Supp. 782 (S.D. Cal. 1980). Anderson again appealed to the Ninth Circuit.

In a unanimous decision, the Ninth Circuit upheld the constitutionality of section 701(j) for the reasons expressed in *Tooley v. Martin Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981), which contained a fact pattern materially identical to *Anderson*, and was argued before the same judicial panel on the same day as *Anderson*.

In *Tooley*, the Ninth Circuit preliminarily noted that the establishment clause permits accommodation of religious beliefs "when the accommodation reflects the 'obligation of neutrality in the face of religious differences,' and does not constitute 'sponsorship, financial support, [or] active involvement of the sovereign in religious activities'. . . ." 648 F.2d 1239, 1244 (citations omitted). The appellate court stated that accepting the plaintiff's offer of a charity substitution reflects governmental neutrality because it places the accommodated employee on an equal footing with other employees whose religious convictions are not impinged upon by their jobs. The accommodated employee suffers the same economic loss as union members, and the government is not sponsoring or supporting the employee's religion.

The *Tooley* Court then analyzed section 701(j) under the tripartite test and concluded that the statute is constitutional. First, the court stated that simply because section 701(j) resolved certain problems confronting sectarians did not in itself indicate a sectarian purpose. Rather, the court found that the purposes of the provision, to prohibit discrimination in employment and to "secure equal employment opportunity to members of minority religions," were clearly secular. 648 F.2d at 1245. Next, the appellate court found that the primary effect of section 701(j) neither inhibits nor advances religion: "The substituted charity accommodation allows the plaintiffs to work without violating their religious beliefs, at a cost equivalent to that paid by their co-workers without similar beliefs." 648 F.2d at 1246. Although the court recognized that the charity substitution may be construed to place an "inappreciable but inevitable burden" on the unaccommodated union members, it held that this is not enough to constitute "advancement of religion" under the establishment clause. Finally, the Ninth Circuit found that the charity substitution would not require excessive government entanglement with religion, since only a minimal amount of supervision and administrative cost would be required.

The Supreme Court refused to review the decisions in *Anderson* and *Tooley* upholding section 701(j).

The Ninth Circuit's unanimous ruling in *Anderson* is in accord with the Seventh Circuit's decision in *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO*, 643 F.2d 445 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981), and the Sixth Circuit's decision in *McDaniel v. Essex International, Inc.*, 696 F.2d 34 (6th Cir. 1982). In an earlier decision, the Eighth Circuit also ruled section 701(j) constitutional. *Trans World Airlines v. Hardison*, 527 F.2d 33 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 63 (1977). The Supreme Court's action in *Hardison*, *Nottelson*, *Anderson* and *Tooley* makes it clear that the Court does not intend to rule on the constitutionality of section 701(j), at least at this time. Although the reason is, of course, speculative, it is possible that the Supreme Court has allowed the Sixth, Seventh, Eighth and Ninth Circuit decisions to stand because it is satisfied with these rulings and because there is no conflict among the Courts of Appeals.

Thornton v. Caldor, Inc., 191 Conn. 336, 464 A.2d 785 (1983), *cert. granted*, 52 U.S.L.W. 3650 (March 5, 1984) (No. 83-1158)

The *Thornton* case presents the Supreme Court with a conflict between free exercise rights and the establishment clause: at issue is the constitutionality of Connecticut's Sabbath observer statute.

In 1975, Donald Thornton began working for Caldor, Inc., a retail department store with branches throughout New England. At that time, pursuant to state law, Caldor's Connecticut stores were closed on Sunday. In 1976, the Sunday Closing Laws were revised to permit certain businesses to open on Sunday. The new law provides, however, that no employee can be required to work more than six days in any calendar week. The revised law also provides:

> No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal. Connecticut General Statutes §53-303e(b).

Pursuant to the revised law, Caldor opened its Connecticut stores for business on Sundays and required its department managers, including Donald Thornton, to work one out of every four Sundays. In November, 1979, Thornton requested that he be excused from work on Sundays as that was his Sabbath. Caldor refused to honor this request and instead, offered Thornton a choice: either he could transfer to a Massachusetts store where he would not be required to work on Sundays, or he would be demoted to a non-supervisory position at his present location. While

this latter alternative did not involve Sunday work, it would result in a substantially lower salary.

Thornton rejected both alternatives and submitted his resignation. His grievance was sustained by the state board of mediation, which ordered reinstatement with back pay. Although Caldor had challenged the constitutionality of the Sabbath observer statute as part of its defense, the board declined to address this issue.

Caldor filed a petition in state court to vacate the award of the board of mediation. The trial court again ruled for Thornton, upholding the constitutionality of the statute against an establishment clause challenge. In so doing, the court relied on *McGowan v. Maryland*, 366 U.S. 420 (1961),* to support the right of the state to provide for a day of rest. The Connecticut Superior Court found that the statute enables the state to protect its citizens from the dangers of uninterrupted labor without infringing upon any individual's right to practice the religion of his or her choice.

The Connecticut Supreme Court, however, reversed, holding that the Sabbath observer statute violated the tripartite establishment clause. First, the court held that the statute did not have a secular purpose, but rather its purpose was "to allow those persons who wish to worship on a particular day the freedom to do so." *Caldor, Inc. v. Thornton*, 464 A.2d 785, 793. Second, the court held that the statute "conferred its 'benefit' on an explicitly religious basis," making its effect one of advancing religion. *Id.* at 794. Finally, the court found that the statute excessively entangled government with religion. The court reasoned that subsection (c) of the statute, which empowered the state board of mediation and arbitration to resolve disputes between employers and employees arising under the law, required "an analysis of the particular religious practices and. . .a decision concerning the scope of religious activities which may fairly be labeled 'observance of Sabbath.'" *Id.*

The case is currently pending before the Supreme Court.

D. Arab Boycott

Abrams v. Baylor College of Medicine, 581 F. Supp. 1570 (S.D. Tex. 1984)

The significance of the *Abrams* case lies in the fact that it is the first time a private right of action has been recognized under the anti-boycott provisions of the Export Administration Act, which prohibit U.S. companies from participating in or complying with the Arab boycott of Israel and Israeli interests. 50 U.S.C. App. §§2401-2420 (Supp. V 1981).

In 1977, Baylor College of Medicine, in cooperation with the government of Saudi Arabia, began a medical rotation program in which it sent cardiovascular surgical teams to King Faisal Hospital in Saudi Arabia at twice the salary level offered at Baylor's Houston facility. Although there was no express agreement or understanding between Baylor and King Faisal Hospital to the effect that Baylor would not send Jews, no Jewish doctors were sent to the foreign facility.

Lawrence Abrams and Stuart Linde, two Jewish doctors employed by Baylor who were denied the opportunity to participate in the program at King Faisal Hospital, brought suit under Title VII of the Civil Rights Act of 1964, alleging religious discrimination. The doctors also asserted that Baylor had violated the anti-boycott provisions of the Export Administration Act. The U.S. District Court for the Southern District of Texas found that the doctors had established a *prima facie* case under Title VII in that they were denied access to the program because they are Jews and their exclusion was not justified by either a business necessity or a *bona fide* occupational qualification. The court awarded the physicians back pay with interest to redress the economic injury which resulted from the unlawful discrimination.

The court also held that a private right of action exists under the anti-boycott provisions of the Export Administration Act. The court found the background of these provisions significant. In the mid-1970's Congress became concerned with efforts mounted by Arab countries to pressure American companies into furthering their boycott of Israel and Israeli interests. As a result, Congress amended the Export Administration Act to make compliance with the boycott illegal. Federal law prohibits Americans from participating in the boycott by discriminating against Israeli firms or Jews and requires American companies to file reports with the Commerce Department detailing any requests to comply with the boycott.

District Judge James DeAnda found that the legislative history, viewed as a totality, "militates in favor of implying a private cause of action" not only for Israelis, but for American Jews who have been discriminated against in furtherance of an Arab boycott. 581 F. Supp. at 1581. The court found, however, that Abrams and Linde had been fully compensated by the awards of back pay which had been granted as part of their Title VII remedies and that additional losses would amount to an unjust windfall. The district court's decision will not be final until a decision on an award for attorney's fees is reached. Hence, Baylor has not, to

*In *McGowan*, the Supreme Court upheld the constitutionality of a Sunday closing law. The Court ruled that the purpose of the statute was not to aid religion, but rather, "to set aside a day of rest and relaxation." 366 U.S. 420, 449.

date, appealed to the Fifth Circuit.

It should be noted, however, that in *Bulk Oil (Zug) A.G. v. Sun Co., Inc.*, 83 Civ. 741 (S.D.N.Y. Aug. 11, 1983), *aff'd*, Nos. 83-7779, 7781, 7785 (2d Cir. Feb. 17, 1984), a case involving a contract for a supply of North Sea crude oil, the Second Circuit Court of Appeals held that there was no implied private cause of action under the Export Administration Act. Bulk Zug's petition for rehearing *en banc* by a panel of the appellate court was denied on April 3, 1984. A petition by Bulk Zug in the Supreme Court for review of the case is currently pending. The precedential value of the *Baylor* decision is questionable in light of the Second Circuit's ruling. A decision from the Supreme Court on the issue of whether a private right of action exists under the Export Administration Act will, therefore, be instructional.

V. PUBLIC SPONSORSHIP OF RELIGION

The three cases discussed under this heading represent significant decisions by the Supreme Court on the relationship between government and religion. Focusing on three diverse areas, federal tax exemption, state liquor licenses and legislative chaplains, the Court, in its opinions, approached the constitutional issues in distinctly different ways.

A. Tax Exemption for Racially Discriminatory Private Schools

Bob Jones University v. United States, 103 S. Ct. 2017 (1983)

Bob Jones University is a private educational institution located in South Carolina which places special emphasis on Christian values in its curriculum, student and faculty recruitment, and campus life. Prior to 1971, the school refused to admit blacks. Today, Bob Jones accepts applications from blacks, but expels any student who engages in or advocates interracial dating or marriage. According to the school, this policy is mandated by a religious belief that the Bible forbids these practices.

Bob Jones was tax exempt until 1970, when the IRS announced its intention to challenge federal tax exemption of private racially discriminatory schools on the grounds that such institutions are not "'charitable' within the common law concepts reflected in [federal tax laws]." Revenue Ruling 71-447. The school filed suit in federal court claiming it was improperly denied tax exempt status by the IRS.

The school prevailed at the lower court level, but lost when the government appealed the decision. *Bob Jones University v. United States*, 468 F. Supp. 890 (D.S.C. 1978), *reversed*, 639 F.2d 147 (4th Cir. 1980).

After the Supreme Court agreed to review the case, President Reagan announced that the IRS had overstepped its authority in 1971 when its policy regarding discriminatory private schools changed. Consequently, the U.S. Justice Department filed a brief supporting the proposition that Bob Jones was entitled to tax exemption. Since that left no party to the litigation defending the IRS action, the Supreme Court appointed special counsel to argue that the tax exemptions were properly denied.

On May 24, 1983, in an 8-1 decision, the Supreme Court held that Bob Jones' racially discriminatory policies make it ineligible for federal tax exemption. Much of the Court's opinion focused on whether the IRS acted within its statutory authority in determining that in order to qualify for tax exemption, Bob Jones not only had to show it was organized for educational purposes, but also that its activities are consistent with public policy. Chief Justice Burger, writing for the majority, held that the IRS' interpretation of federal tax laws was correct, and that Congress had "affirmatively manifested its acquiescence in the IRS policy." 103 S. Ct. at 2032. The Court declared:

> Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education. Given the stress and anguish of the history of efforts to escape from the shackles of the "separate but equal" doctrine of *Plessy v. Ferguson*, it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising "beneficial and stabilizing influences in community life," or should be encouraged by having all taxpayers share in their support by way of special tax status. 103 S. Ct. at 2030 (citations omitted).

The Court was unpersuaded by the school's claim that, because its policies were based on sincerely held religious beliefs, they were protected by the free exercise clause. Although the Court accepted the sincerity of the school, it noted that not all burdens on religion are unconstitutional; on occasion, a limitation on religious liberty may be justified by a compelling governmental interest. In this case, Chief Justice Burger found that the government's "fundamental, overriding interest in eradicating racial discrimination in education...substantially outweighs whatever burden denial of tax benefits places on [Bob Jones'] exer-

cise of their religious beliefs." 103 S. Ct. at 2035 (footnote omitted).

B. Church Veto Power Over Liquor Licenses

Larkin v. Grendel's Den, 103 S. Ct. 505 (1982)

In 1977, the operators of Grendel's Den, a Cambridge, Massachusetts restaurant, sought a liquor license. The license was denied on the basis of an objection by a Catholic church, located adjacent to the restaurant. Massachusetts state law (Chapter 138, Section 16C) provides that "premises . . . located within 500 feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto." The restaurant owners challenged the constitutionality of section 16C in federal district court, which, in 1980, held that the statute violated the establishment clause of the First Amendment and the due process clause of the Fourteenth Amendment. *Grendel's Den v. Goodwin*, 495 F. Supp. 761 (D. Mass. 1980). The First Circuit, ruling *en banc*, affirmed the lower court's decision on establishment clause grounds without ruling on the due process claim. 662 F.2d 102 (1st Cir. 1981).

The U.S. Supreme Court, by an 8-1 vote, affirmed the First Circuit decision based solely on traditional establishment clause analysis. Chief Justice Burger, writing the forceful majority opinion, characterized section 16C as an unconstitutional delegation to churches of legislative veto power.

Although the Court recognized that the state has a valid secular purpose in protecting churches and schools from the "'hurly-burly' associated with liquor outlets," it found that this objective could be reached through other means, *i.e.*, an absolute ban on certain liquor licenses or administrative hearings on liquor licensing. 103 S. Ct. at 510.

Rejecting the state's claim that the statute had only an incidental and remote effect on the advancement of religion, Chief Justice Burger found that churches' power under section 16C was "standardless" and not restricted to "religiously neutral" practices. 103 S. Ct. at 511. Further, "the mere appearance of a joint exercise of legislative authority by the Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Id.*

Finally, the Court held that the "statute enmeshes churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause. . . . Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution." 103 S. Ct. at 512 (footnotes and citations omitted).

C. State Employed Legislative Chaplains

Marsh v. Chambers, 103 S. Ct. 3330 (1983)

In *Marsh v. Chambers*, the Supreme Court upheld the Nebraska Legislature's sixteen year practice of opening each legislative day with a prayer by a state-employed Christian chaplain. The case arose when one state legislator filed suit, claiming the retention of a chaplain of one denomination for an extended length of time, coupled with the use of state funds to publish books containing the chaplain's prayers and to compensate the chaplain for reciting sectarian denominational prayers, is a violation of the establishment clause. A federal district court decision holding the chaplaincy practice unconstitutional was affirmed by the Eighth Circuit on the narrow ground that "[t]he state has placed its official seal of approval on one religious view for 16 years." *Chambers v. Marsh*, 504 F. Supp. 585 (D. Neb. 1980), *aff'd*, 675 F.2d 228, 234 (8th Cir. 1982).

The Supreme Court decision upholding the chaplaincy practice and the state funding was especially disturbing in light of the majority's analysis. Chief Justice Burger's opinion for the Court relied heavily on the 200-year tradition of federal chaplaincies which pre-dated the First Congress in 1789:

> Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruptions ever since that early session of Congress.
>
> . . .
>
> In this context, historical evidence sheds light not only on what the draftsmen intended the establishment clause to mean, but also on how they thought that clause applied to the practice authorized by the First Congress—their actions reveal their intent. 103 S. Ct. at 3334 (footnote omitted).

Although the majority made a cursory review of the specific features of the challenged Nebraska chaplaincy, the Court's decision was essentially based on historical precedence: if the practice occurred in 1789, we can assume the Framers of the Bill of Rights approved it; therefore it remains constitutional today.

Three challenges to the Nebraska practice were asserted: 1) a clergyman of one denomination had been selected for sixteen years; 2) the chaplain was paid at public expense; and 3) the

prayers were in the Judeo Christian tradition (the chaplain removed all references to Christ after receiving a complaint from a Jewish legislator in 1980).

Chief Justice Burger stated that rather than expressing a preference for the beliefs of a particular religious faith, the chaplain's long tenure continued "because his performance and personal qualities were acceptable to the body appointing him." 103 S. Ct. at 3336 (footnote omitted). The Court approved Nebraska's public expenditures, since the Continental Congress had also paid its chaplain. Refusing to review the chaplain's prayers, the Court stated:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer. 103 S. Ct. at 3337.

In a lengthy dissent joined by Justice Marshall, Justice Brennan criticized the majority for "carving out an exception to the establishment clause," and found the chaplaincy violative of all three prongs of the tripartite test. 103 S. Ct. at 3338 (Brennan, J., dissenting). Justice Brennan then refuted the "historical" argument expounded by the majority, noting in his dissent, "certain other skeletons in the congressional closet" such as the Act of July 23, 1866, which reaffirmed the racial segregation of public schools and was enacted exactly one week after Congress referred the Fourteenth Amendment to the states for ratification. *Id.* at 3347.

CONCLUSION

In the conclusion of the 1981 Law Report on church-state separation, we noted our concern that the cases evidenced "a disturbing trend." That trend has accelerated in the last three years. The cases and legislation discussed above serve to underscore the proliferation of government aid to and sponsorship of religious activities.

The First Amendment's establishment clause requires that government maintain a stance of "benevolent neutrality" toward religion. This fundamental principal of government neutrality does not conflict with the government's affirmative obligation under the free exercise clause to accommodate religious beliefs of individuals. The free exercise clause does not, however, require government sponsorship of religion, but rather, that government "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. For it then respects the religious nature of our people . . . ." *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952).

Thus, the free exercise clause does not alter government's obligation to treat all religions, and religion in general, neutrally; it mandates only government respect for each individual's religious beliefs. In *Lynch v. Donnelly*, however, the religious beliefs of the majority were promoted at the expense of the minority, who could interpret the creche display as a powerful message from government endorsing the majority religion.

Religion is accorded special constitutional protection under the First Amendment. James Madison wrote that it is because "religion is too personal, too sacred, too holy." The Supreme Court recognized, over forty years ago, that the purpose of the establishment clause "rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). The bitter conflicts over such issues as school prayer, tuition tax credits and public religious displays should be a clear signal that government is not the proper sponsor nor are our public schools the proper setting for religious activity.

In litigation and legislative battles over tuition tax credits, school prayer and Nativity Scene displays, the conflict is not over the value of religion. The controversies themselves are evidence of the value we place on religion. But the divisiveness inherent in these conflicts endangers religious pluralism and tolerance, which are equally valuable to us and infinitely more fragile. These fundamental principals can flourish and be protected only if our religious beliefs and practices remain a personal matter, and are insulated against interference by government.

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH/823 UNITED NATIONS PLAZA/NEW YORK, NEW YORK 10017